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Editorial

Constitutional Court Review Beyond the Global Pandemic

This issue of Constitutional Court Review (CCR) was born at a time when ‘social distancing’ was a technical term with currency only among specialists in public health circles. In August 2019, our annual conference was held over two days in which a fascinating array of papers was discussed and honed — face-to-face — by participants united in the common enterprise of engaging in-depth with the work of the Constitutional Court of South Africa. Backward looking in one sense, this journal reflects on recent jurisprudence of the Court and its development over time. In so doing, scholars play a critical role in the constitutional schema that holds the Court to account for its reasoning and decisions. In another sense, the journal is forward-looking, revealing alternate paths not taken or engaging with issues that inevitably will come before the Court. While the interplay of past, present and future is perhaps characteristic of the legal enterprise as a whole, it is of particular value to the constitutional project that aims to transform South African society fundamentally.

There is nothing like a health pandemic to highlight societal and institutional deficiencies. Many bad habits, reminiscent of a past against which the constitutional order is a firm counterpoint, resurfaced during this time. Mureinik’s bridge to a culture of justification became shaky as latent authoritarian tendencies re-emerged. Security forces dealt violently with people struggling to comply with lockdown regulations; South African citizens and non-citizens alike struggled to access social assistance with migrants and refugees facing additional burdens; and Ministers imposed a raft of regulations restricting individual rights, a number of which were nonsensical (such as banning exercise outdoors — essential for mental health and with low risk of viral transmission — and specifying which clothes could be bought in retail stores). It became evident that there are significant differences between measures required to address public health emergencies and those required for conflict- or public order-related emergencies. Derogation clauses in constitutions such as ours are better suited to the latter. The executive did not employ this framework with its in-built safeguards, but instead used disaster legislation to issue a raft of regulations with very limited parliamentary oversight. These, and other matters, are working their way through the courts and no doubt will provide the basis for much analysis in future editions of this journal. This period highlights the importance of deepening our commitment to constitutionalism which becomes ever-more important when societal systems are under strain. Sadly, this is likely to continue into the foreseeable future as the economic impacts of COVID-19 continue to bite.

CCR is not the project of a singular individual but rather of a group of dedicated, autonomous people working towards a collective aim. Starting with this issue, four editors were appointed to a volume-specific editorial committee (VSEC), each responsible for shepherding a batch of articles to publication. I am deeply grateful to them for their hard-work: Jason Brickhill, Khomotso Moshikaro and Franziska Sucker — a very sincere and deep thank you!
The VSEC is complemented by an editorial board whose members are responsible for taking submitted articles through the rigorous review process. *CCR* prides itself on its editors who engage deeply with articles, subjecting them to thorough scrutiny and ensuring the high quality of contributions. I thank these editors for their hard work in bringing this volume to fruition; it is deeply appreciated and the greatest reward is to see the excellent pieces that have resulted from our collective efforts. The support and dedication of the managing editor, Michael Bishop, is also deeply appreciated. A particular thank you must go to the editor-in-chief, Stu Woolman, for his deep commitment to this journal and for ensuring that it continues to publish articles of outstanding quality. We hope you are proud of our work, Stu!

Of course, editors have no material without the authors who are at the heart of the academic enterprise. We are privileged to have attracted submissions from an excellent and diverse array of authors who have produced outstanding pieces. We are grateful to them for joining us at the conference, contributing to our journal and working to meet deadlines. We also very much appreciate the work of our reviewers who perform a hidden and thankless task but contribute so much to scholarship.

A big thank you must go to the Konrad Adenauer Stiftung (KAS) who have supported the journal since its inception, enabling us to host the annual conference and generously contributing to the production costs of the journal. We are grateful to Henning Suhr, resident representative for South Africa, and project manager Nancy Msibi for their continued assistance with the journal.

*CCR* is also closely associated with the South African Institute for Advanced Constitutional, Public, Human Rights and International Law (SAIFAC) which I direct. A centre of the University of Johannesburg, SAIFAC has taken charge of organising the journal’s annual conference and, in a sense, providing a physical home for the journal at its seat on the iconic Constitution Hill. I thank Naomi Hove for her administrative excellence which ensured that the 2019 conference ran according to plan, as well as Mispa Roux, Justin Wanki and Nabeelah Mia for their assistance. We also value and appreciate our institutional connection to the University of the Witwatersrand’s School of Law.

Last but definitely not least, a journal cannot survive without a high-quality publisher and *CCR* has found just such a publisher in NISC. We are deeply grateful to their publishing editor, Jane Burnett, for her efficiency, diligence and responsiveness in producing this edition of our journal. We thank NISC’s managing director, Mike Schramm, for believing in the journal and helping to grow its global reputation and footprint.

To our readers, we hope you find these articles stimulating, challenging and enlightening.

**DAVID BILCHITZ** (Editor, *Constitutional Court Review* Volume X)

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The Constitutional Court’s 2018 Term: Lawfare or Window on the Struggle for Democratic Social Transformation?

THEUNIS ROUX

ABSTRACT: This article reviews the South African Constitutional Court’s 2018 term. Against assessments that argue that the Court, and the judiciary in general in South Africa, have become immersed in ‘lawfare’, it argues that the Court’s 2018 term is illustrative of an institution that is setting the constitutional parameters for democratic social transformation. Analysing twelve decisions covering a range of issues, from high-stakes questions of foreign policy to what may permissibly be said in the workplace, the article finds little evidence for any of the three concerns typically associated with the lawfare critique, viz., the debilitation of democratic politics by the diversion of political struggles into the courts, the politicisation of the judiciary through loss of public confidence in its impartiality, and the abuse of the judicial process by political office bearers intent on avoiding accountability for their actions. In fact, in all three instances, the outcome is almost exactly the opposite of what the lawfare critique supposes. Rather than undermining democratic politics, the Court’s decisions have been effective in reinforcing constitutional institutions established to support democracy. Instead of becoming politicised, the Court has successfully used legalist reasoning techniques and rhetorical devices to convert political questions into legal questions. And far from suffering the abuse of its processes, the Court has been able to use a range of remedial orders to sanction litigants who have lied to it or otherwise attempted to delay the onset of justice. In all these ways, the Court’s approach to its mandate conforms to a progressive liberal conception of constitutional adjudication as providing the framework for, rather than displacing, democratically driven social change.

KEYWORDS: comparative constitutional law, judicial review, South Africa

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I INTRODUCTION

The South African Constitutional Court’s 2018 term traversed a vast array of issues, including family law and maintenance matters,1 labour disputes and trade union turf battles,2 racist speech,3 the right to protest,4 refugee rights,5 gun control,6 political party funding,7 social security grants,8 land and property rights,9 criminal and civil procedure,10 local government,11 and customary law.12 As one reads through the judgments, an impression of contemporary South African life begins to emerge. It is a story in part of governance failures and of social transformation goals not yet realised. But it is also a story of vibrant civil society organisations demanding that government perform better; of poor and marginalised groups finding their voice and claiming their rights; and of the dedicated work that many people in the country are doing to improve the functioning of public and private institutions.

To be sure, the picture that the cases paint is not completely representative. People do not go to court, after all, unless they, or the institutions on which they depend, are in some kind of crisis. Thus, all the occasions on which officials did their jobs properly, institutions functioned as they were expected to, and people were civil to each other, do not appear in the Court’s 2018 record. In addition, constitutional litigation, in the nature of things, can address only some of the ways in which public and private power is exercised. Decisions by international actors — such as those by multinational corporations about where to invest and by President Donald Trump about what to tweet — are not represented in the cases.13 Closer to home, the cases do not fully reflect the oppressive social and economic power structures to which poor, mostly black South Africans, are subject. Nevertheless, despite these omissions, the picture that the cases paint is undoubtedly more detailed than would have been the case twenty, or even

1 SS v VVS [2018] ZACC 5, 2018 (6) BCLR 671 (CC).
5 Saidi & Others v Minister of Home Affairs & Others [2018] ZACC 9, 2018 (4) SA 333 (CC); Gavric v Refugee Status Determination Officer, Cape Town & Others [2018] ZACC 38, 2019 (1) SA 21 (CC); 2019 (1) BCLR 1 (CC).
6 Minister of Safety and Security v South African Hunters and Game Conservation Association [2018] ZACC 14; 2018 (2) SACR 164 (CC), 2018 (10) BCLR 1268 (CC).
12 Sigcau & Another v Minister of Cooperative Governance and Traditional Affairs & Others [2018] ZACC 28, 2018 (12) BCLR 1525 (CC).
13 As distinct from international law, which is becoming more prominent in the Court’s case law.
ten, years ago. In simple numbers, the Constitutional Court (‘the Court’) today decides about twice as many cases each year as it did in its first decade. The nature of the cases has changed, too, from the rights-based challenges to old-order legislation that dominated the Court’s first decade to the detailed, fact-driven inquiries into the lawfulness of executive and administrative action that occupy it today.

There are, of course, several reasons for these changes. With the expansion of the Court’s jurisdiction in 2012 to non-constitutional matters, the opportunity for appeals from the Supreme Court of Appeal (SCA) has increased. In addition, the development of the principle of legality as a broad ground for the review of exercises of executive power has given the Court a wider mandate than was perhaps originally envisaged. But some of the Court’s heavier case load, at least, has to do with an increasing turn to litigation on the part of public office bearers and the people impacted by their decisions. Whereas the Court’s docket was dominated in the first decade of its institutional life by questions of collective political morality, such as the constitutionality of the death penalty, today the day-to-day workings of government are laid bare in court. Not just a thicker slice of social life, but also of specifically political life, is finding its way into the Court’s judgments.

Is this something we should be concerned about? Is the fact that more and more everyday politics is passing through the Court a troublesome development or just the inevitable, and entirely healthy, consequence of the country’s turn to constitutionalism and judicial review?

In their recent, co-authored book, Michelle le Roux and Dennis Davis sound a note of alarm. While acknowledging the benefits of certain types of constitutional litigation, they argue that the increased rate of such litigation may have had a debilitating impact on the quality of South Africa’s democracy. They are concerned, too, about the effect of all of this on the courts, and their ability to carry out their designated functions. Central to their argument is the concept of ‘lawfare’, which they borrow from expatriate South African anthropologists, Jean and John Comaroff. Though wonderfully protean, as we shall see, this term has a predominantly negative connotation, calling up as it does an idea of the law being improperly used in pursuit of political ends. In the Comaroffs’ usage in particular, the judicialisation of social and economic struggles that has allegedly followed on the adoption of the Constitution of the Republic of South Africa, 1996 (‘Constitution’) is treated as a troubling development — as a form of ‘fetishism’ that distracts from the true purposes and possibilities of democratic politics.

Neither le Roux and Davis nor the Comaroffs offer rigorous evidence in support of these concerns. Their methodology is rather to exploit the ambiguity of the term ‘lawfare’ to create a general sense of disquiet. Le Roux’s and Davis’s book, for its part, starts with a relatively clear statement of the problem, but then proceeds to a series of interesting but not obviously connected discussions of politically controversial cases. In consequence, it is not exactly clear what they are arguing. By their own admission, ‘lawfare’ comes in both ‘good’ and ‘bad’

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14 This is not just a function of docket control because the Court does not have as much discretion over its case load as other constitutional courts.
15 Section 167(3)(b)(ii) of the Constitution, as amended in 2012, gives the Court jurisdiction, in addition to constitutional matters, over any matter that raises ‘an arguable point of law of general public importance’.
18 See the references in IIA below.
forms. That being the case, their project required them to provide a conceptual framework for distinguishing between these two manifestations of the phenomenon and at least some sense of how the problems they identify might be mitigated. The Comaroffs’ work is more conceptually sophisticated. The problem in this instance is that their argument is driven by a particular normative take on post-apartheid constitutionalism rather than a concern for empirically substantiating the claims they make about the Constitution’s effects. We are thus left with a clear sense of the Comaroffs’ distaste for what they take to be the Constitution’s liberal-democratic commitments but no understanding of what should be changed if that distaste is not shared.

Against this background, the aim of this article is to bring more conceptual clarity to the debate — to use an assessment of the Court’s 2018 term as an opportunity to reflect on what the lawfare concern is really about and whether South Africans indeed have grounds to be worried. I start by tracing the lineage of the term. As noted, le Roux and Davis borrow it from the Comaroffs, who first referred to ‘lawfare’ in a 2001 article. But the term also has other origins. Roughly contemporaneously with the Comaroffs’ first usage, ‘lawfare’ was invoked by a US military lawyer as a label for the alleged abuse of international human rights law by America’s supposed enemies. Closely allied to this, a pro-Israeli sense of the term emerged to describe the way in which international human rights law is supposedly being used to attack that country. Over the last five years, the term has morphed again, finding contemporary relevance as a label for the way that law has been used, particularly in Latin America, to neutralise legitimately elected democratic leaders.

With this understanding of the genealogy of the term in place, the second section breaks down the worry about lawfare into three specific concerns. The first is a concern about the debilitation of democratic politics that has allegedly followed the adoption of the Constitution. This concern is founded in the first instance on a leftist critique of the tendency of liberal-democratic governance systems to displace bottom-up popular rule with technocratic control. But it is also a concern that resonates with an older US civil rights literature, dating from the 1960s and 70s, about the dangers of waging political struggles through the courts. Finally, in its specifically South African manifestation, it is a concern about the way in which the Constitution allegedly diverts attention away from the broad sweep of South African history and the deep-seated sense of historical injustice and cultural alienation that black South Africans feel.

The second concern is about the effects of lawfare on the courts. In particular, the worry is that the judiciary, in the face of so much litigation about so many controversial issues, will inevitably be drawn into politics and thereby lose its reputation for independence on which its ability to constrain the abuse of political power depends. The Constitution, this concern goes, suffers from an overreach problem. In its ambitious attempt to subject all public and private power to legal constraints, it has triggered a reaction — the politicisation of the judicial process — that has undermined the achievement of that goal. While this concern has been voiced by critical left commentators, it is clearly one that connects to the traditional preoccupations of liberal constitutional theory, such as the need for a separation of powers and the role of courts as independent checks on the abuse of political power.

The third and final concern is narrower than the other two, although it picks up on aspects of both. It is a concern about the seeming ease with which corrupt officials in South Africa, often at public expense, have been able to avoid accountability for their actions by

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19 Le Roux & Davis Lawfare (note 17 above) 5.
delaying cases, either by taking procedural points or through endless appealing. Related to this, commentators have worried about the extent to which powerful individuals with deep pockets have been able to use not just legal proceedings, but law more generally, to achieve victories that they would not be able to achieve through ordinary democratic means. This concern thus combines aspects of the first concern about democratic debilitation with the second concern about the impact of lawfare on the judicial process. Nevertheless, it is sufficiently distinct to warrant examining separately.

While the second part of the article sets out these three concerns, the third part drills down on them to see whether they stand up to scrutiny. At a purely conceptual level, I argue, each of the concerns has certain features that suggest that it may be prone to overstatement. The problem with the first concern is that it assumes that the diversion of political disputes into courtroom battles necessarily cuts across democratic politics — that it is a question of a zero-sum game, in other words, in which as much politics as flows into the courts flows out of the democratic arena. Even without considering the Court’s case law, that assumption seems questionable. There is no reason in principle why the diversion of political disputes into the courtroom should extinguish those disputes as a political matter. To be sure, some judicial decisions can be understood as policy interventions of sorts. But, as the US experience with abortion litigation shows, even such decisions do not represent the end of the road for democratic politics. Rather, as Gordon Silverstein has argued, constitutions that provide for judicial review invite an iterative, mutually constitutive relationship between law and politics, 20 so that what we get is not necessarily the death of democratic politics but a more complex and potentially richer form of democratic politics.

The second concern is also often overstated. On its own, the observation that the Constitution has drawn the courts into politics is question-begging. The real issue is whether the courts are able to maintain both their actual independence and their reputation for independence in the face of the controversial cases that they are asked to decide. While this is a highly disputed topic, many commentators would agree that a written constitution in a developed legal tradition with well-institutionalised conventions of legal reasoning has at least some capacity to restrain the influence of politics on judicial decision-making. Whether politicisation in this form occurs is thus always something that has to be investigated rather than a consequence that can simply be assumed. As to the question of perceived independence, even those who doubt law’s actual constraining capacity might concede that law is a flexible enough medium to allow skilful judges to present their decisions as legally constrained. To be sure, in any reasonably complex constitutional system, there is a broadly shared sense of where the boundary between law and politics lies. But it is a boundary that judges can manipulate in various ways, either in a single case or in the general way in which they approach their mandate. Thus, once again, politicisation is not an inevitable result of the adoption of a system of judicial review but a possible consequence that has to be separately investigated in each case.

Finally, the third concern — about the use of procedural tactics and appeals to avoid accountability — assumes that the courts have no ability to prevent this kind of behaviour, i.e. that there are no mechanisms, such as punitive costs orders, that may be used to deter the abuse of the judicial process in this way. This concern also assumes that public office bearers who engage in these tactics will not pay some other price — such as a loss of credibility — that may act as just as much of a deterrent or sanction as anything that the courts do. Even if these

safeguards do not work, the remaining instances in which procedural rights are abused may be a price that is worth paying for the general subjugation of the exercise of political power to law.

Having analysed each of these concerns at a conceptual level, the third and fourth parts of the article turn to the Constitutional Court’s 2018 term. As noted, the cases do not paint the whole picture, and thus we should be cautious about drawing firm conclusions. It could be that the Court’s record is a sideshow of sorts — that however admirable its jurisprudence on paper, the Constitution is still failing South Africa. Certainly, it is not irrelevant that the cases discussed were all decided while the brute facts of unemployment, grinding poverty and physical violence continued unabated. But the point of the case analysis is not to investigate the broad effects of constitutionalism in South Africa but to examine whether the charge of ‘lawfare’ has any purchase. It is possible to do that by asking a series of fairly simple questions. What sorts of cases are being litigated and is there any sense in which these cases are displacing ordinary democratic politics? How convincing were the Court’s justifications for its decisions and can we detect any obvious signs of political influence? And, finally, is there any evidence that the Court’s processes are being abused so as to avoid accountability?

Even with this fairly simple list of questions, the task is considerable. The sheer volume of cases — fifty-two — means that it is not possible in a single article to be comprehensive. Some basis for sampling needs to be found. As explained in more detail in part III below, twelve decisions were chosen for reasons of political salience, i.e. their importance to broader policy debates and institutional processes, and in terms of the number of South Africans affected. The sampled decisions were then broken into two further sub-groups: those dealing with democratic rights and the functioning of constitutional institutions, and those dealing with issues of social transformation and historical (in)justice. The sample deliberately leaves out cases on refugee rights and minority trade union rights on the grounds that these are separately discussed in this volume.

Analysis of the sampled cases in part IV reveals very little support for the three lawfare concerns in the Court’s 2018 record. Far from displacing democratic politics, many of the cases are about preserving the institutional preconditions for democratic politics. Far from being politicised, the Court was able in the cases discussed to present what it was doing as the impartial enforcement of constitutional standards. And, thirdly, while there is some evidence of the attempted abuse of the judicial process, the cases reveal that the Court has been able to devise ways of combating this problem.

If not evidence of lawfare, then, what do the cases show? The concluding part of the article argues that the cases decided in the Court’s 2018 term reveal a Court that has largely remained faithful to its mission of supporting democratic politics as the main vehicle for social and economic transformation. What has changed from the first ten years of its operation is that the Court has become much more concerned with upholding the integrity of the democratic system. Whereas in the first decade of its existence, it was inclined to treat the political branches as a partner in the realisation of the constitutional project, the Court is now actively engaged in protecting the democratic system against subversion. The nature of its judgments has also been changing, from the fairly legalist approach that the Court took in the first decade of its existence to a more direct reliance on commonsense ethical standards. In the face of a poorly performing and deeply corrupt governing party that the electorate has, for complex reasons, declined to vote out of office, the Court has given voice to the moral outrage that many South Africans feel.
II ORIGINS AND MEANING OF THE TERM ‘LAWFARE’

The term ‘lawfare’ first appeared in the Comaroffs’ work in 2001, in an introduction to a symposium on ‘colonialism, culture and the law’. 21 Pivoting off Martin Chanock’s observation about law being the ‘cutting edge of colonialism’, 22 they cite a nineteenth-century historical source describing the Setswana practice of referring to the ‘appurtenances’ of English colonial law as a ‘mode of warfare’. 23 This sets up their initial definition of ‘lawfare’ as ‘the effort to conquer and control indigenous peoples by the coercive use of legal means’. 24

In this first usage, then, the term resonates with a long literature on the abuse of law, and the ideology of legalism in particular, during the colonial era. 25 As is all too familiar to South Africans, the rule of law has a dark side. 26 The principle of law’s separation from politics that undergirds this idea in liberal constitutional theory was distorted under colonial rule to justify the division of society into two spheres, one in which law indeed rules and the other in which colonised peoples are made the objects of law’s repressive commands. The Comaroffs’ use of the term ‘lawfare’ to describe this phenomenon does not add much to the existing literature, but it does emphasise the violence of colonial law in a way that more benign terms like ‘rule by law’ fail to do. As such, it is a useful addition to our vocabulary.

Around the same time as the Comaroffs were composing their symposium introduction, the term ‘lawfare’ was independently introduced to a very different audience by Major General Charles Dunlap, 27 then a deputy judge advocate general in the legal arm of the US Air Force. In a 2001 Harvard University working paper, Dunlap referred to the way that political lobby groups were allegedly using international human rights law to obstruct US foreign policy. ‘Lawfare’, Dunlap wrote:

> describes a method of warfare where law is used as a means of realizing a military objective … There are many dimensions to lawfare, but the one [increasingly] embraced by U.S. opponents is a cynical manipulation of the rule of law and the humanitarian values it represents. Rather [than] seeking battlefield victories, per se, challengers try to destroy the will to fight by undermining the public support that is indispensable when democracies like the U.S. conduct military interventions. 28

The Comaroffs and Major General Dunlap, one suspects, could not be further apart on the ideological spectrum. And yet there is a common element in their respective definitions of ‘lawfare’. In both instances, what is being alluded to is the way that the rule of law’s positive,

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23 Ibid at 306.
24 Ibid.
power-restraining overtones can sanitise and mask a more instrumentalist, abusive use of law for political purposes.

Following Dunlap’s intervention, ‘lawfare’ was taken up by pro-Israeli lobby groups to refer to the way that Palestinian sympathisers allegedly use international human rights law to undermine Israel’s national security interests and the rights of Jews in the diaspora more generally.\(^\text{29}\) If you Google ‘lawfare’, one of the top hits is thus ‘The Lawfare Project’, a site that solicits donations to assist Jews across the world in combating this alleged practice.\(^\text{30}\) I say ‘alleged’ because there is considerable doubt about whether the practice actually exists or, if it does, whether it should be interpreted in the way that the pro-Israeli lobby does. Former Constitutional Court Justice, Richard Goldstone’s UN Fact Finding Mission report on the December 2008 Israeli incursion into Gaza, for example, quickly became exhibit no. 1 in this particular use of the term.\(^\text{31}\) Whether or not you agree with the findings and recommendations in Goldstone’s report, there can be no question that it was a sincere attempt to apply international law in a complex setting.

Lawfare, this episode shows, is a highly manipulable term that can be used to refer to very different phenomena, by commentators on opposite sides of the ideological spectrum, and with varying degrees of plausibility. In recent years, the term has been adapted again, this time to describe the use of law, particularly in Latin America, to sideline legitimately elected democratic leaders. The paradigmatic example of this is the way in which former Brazilian President, Luiz Inácio Lula da Silva, was sentenced to prison on allegedly trumped up corruption charges, thus preventing him from running in the 2018 Brazilian presidential elections. The legal backdrop to this incident seems to have been behind the decision on the part of a group of São Paulo attorneys to establish the Lawfare Institute — a left-leaning research and public advocacy group that is in many ways the Lawfare Project’s polar opposite.\(^\text{32}\)

The Comaroffs themselves have extended their use of the term ‘lawfare’ to add new layers of meaning. In a 2004 article, they argued that ‘[t]he faith in the capacity of [the 1996 South African Constitution] to resolve social problems by appeal to legalities verges on fetishism: The Constitutional Court is presented with an extraordinarily broad range of issues on which to adjudicate’.\(^\text{33}\) While ‘lawfare’ does not feature in this particular passage, the Comaroffs go on in this piece to draw an explicit parallel between the colonial abuse of law and the use of ‘the culture of constitutionalism and the language of law’\(^\text{34}\) in the post-colonial state. Referring to their 2001 definition of ‘lawfare’,\(^\text{35}\) the Comaroffs argue that ‘[it] seems overdetermined … that, with the passage into postcoloniality, this same culture, this language, should come of age as the argot of authority, the source of civility, the guarantor of unity amidst difference — and

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\(^{29}\) Sadat & Geng (note 27 above).
\(^{30}\) Available at www.thelawfareproject.org. See also www.en.wikipedia.org/wiki/Lawfare_Project.
\(^{32}\) Available at http://lawfareinstitute.com/ (John Comaroff is one of ten members of the Lawfare Institute’s consulting board).
\(^{34}\) Ibid at 540.
\(^{35}\) Ibid (defining lawfare as ‘the deployment of legalities to do violence to people and their property by indirect means’).
should also be invoked by those who would perpetrate their own kind of cultural justice’. The central idea here is that the colonial state’s use of law in the suppression of indigenous peoples’ cultural difference provides the model for, and evinces certain historical continuities with, the post-colony’s suppression of cultural difference in the name of a modern nation state based on allegedly universal principles of human rights and the rule of law.

Two years later, the Comaroffs gave fuller expression to this idea in the introduction to their edited volume on *Law and Disorder in the Postcolony.* The main argument of this piece is that modern liberal-democratic states, and especially those in formerly colonised parts of the world, are caught in a contradiction between their espousal of universalist notions of human rights, democracy and the rule of law and their need to foster culturally diverse ways of being. In a section on ‘the fetishism of the law: sovereignty, violence, lawfare and the displacement of politics’, the Comaroffs repeat their observation about ‘the almost salvific belief in [the] capacity [of national constitutions] to conjure up equitable, just, ethically founded, pacific polities’. They then go on to document the various ways in which the advent of liberal constitutionalism in the post-colony drives law to the centre of social and political life. Documenting the ‘explosion of law-oriented nongovernmental organisations in the postcolonial world’, they argue that ‘nongovernmental organisations of this sort are now commonly regarded as the civilizing missions of the twenty-first century’ and that they are ‘asserting their presence over ever wider horizons, encouraging citizens to deal with their problems by legal means.’ This point is then used as the segue to a comment on the rising rate of litigation in South Africa and the fact that ‘conflict among the African National Congress elect’ is increasingly being fought out in the courts rather than through ‘more conventional political means’. The same is true of other forms of social conflict, they note:

Conflicts once joined in parliaments, by means of street protests, mass demonstrations, and media campaigns, through labor strikes, boycotts, blockades, and other instruments of assertion, tend more and more – if not only, or in just the same way everywhere – to find their way to the judiciary. Class struggles seem to have metamorphosed into class actions.

At this point, then, the transition of ‘lawfare’ from a term used to describe the abuse of law and the ideology of legalism by colonial regimes to a term used to describe the questionable benefits of the increasing centrality of law in post-colonial states is complete.

On one level, this extended understanding of the term involves a purely descriptive, and not terribly novel, claim. The Comaroffs are not the first and certainly will not be the last scholars to take note of the way that liberal constitutions, and especially those that provide for judicial

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36 Ibid.
38 Ibid at 22.
39 Ibid.
40 Ibid at 25
41 Ibid.
42 Ibid at 26.
43 Ibid at 27.
review, tend to judicialise politics. The Comaroffs add to the vast literature on this topic, however, is an observation about the moral desirability of this tendency in the post-colonial African state, and South Africa in particular. By using the term ‘lawfare’ to describe both the abuse of law by colonial regimes and the proliferation of litigation in post-apartheid South Africa, they suggest a certain elective affinity, if not actual causal relationship, between these two phenomena. While their argument is not explicitly spelled out, the connection seems to be that both the colonial and post-colonial states are founded on the liberal rule of law’s capacity to mask the violence that is done to indigenous peoples in the name of supposedly universal, civilised standards of good governance. Understood in this way, their argument takes on a normative inflection. It is not just a description, but also a critique of the effects of liberal constitutionalism in South Africa.

I will have more to say about the Comaroffs’ claims in part III. For the moment, simply note that their critical account of the Constitution’s political and cultural effects is just one of severable possible interpretations. While there are undoubtedly complex continuities between the way law was used in the colonial state and its operation in the post-colonial state, there are other ways of seeing this connection. On the liberal view, at least, the Constitution retrieves and vindicates, not the repressive, violent and deeply hypocritical way that the apartheid government used law, but the nobler vision of law as a constraint on politics that survived the National Party’s depredations. The point was precisely to redeem the unfulfilled promise of the liberal rule of law by creating a state that would extend the same rights as had been enjoyed by the settler population to the black majority. To be sure, this enterprise is fraught with difficulty, not least the task of accommodating African cultural values within a constitutional system that is based, at least to some extent, on European enlightenment ideas. But the suggestion that this amounts to the ‘perpetrat[ion]’ of a culturally chauvinistic, Western conception of ‘justice’ appears to stem from an ingrained distaste for the Constitution’s liberal commitments (such as they are) rather than a dispassionate assessment of its actual effects.

This is not to deny that tremendous reliance was indeed placed on law by those who designed the Constitution. The constitution-making process was undoubtedly an aspirational moment when a new society was re-imagined and expressed in legal form. If there was an unjustified faith placed in law at this time, however, it was by the proponents of ‘transformative constitutionalism’, who called on judges, academics and practising lawyers to treat the Constitution as an ‘ideological project’ of ‘post-liberal’ social and economic transformation. Liberal commentators were generally more circumspect about the role of the Constitution as an instrument of social change in that sense, seeing it rather as a framework for democratic politics. In Etienne Mureinik’s influential metaphor, for example, the 1993 — and by extension, the 1996 — Constitution was a bridge from a ‘culture of authority’ to a ‘culture of


45 The most detailed treatment of this topic is Meierhenrich (note 25 above).

46 Comaroff & Comaroff (note 33 above) 540.

That understanding of the Constitution’s one-stage-removed role in social and economic transformation is also apparent in the Court’s early judgments, in which it treated the African National Congress (ANC) government as the primary agent of this process. In more recent years, to be sure, the Court has lost confidence in the ANC’s capacity to drive the constitutionally imagined transformation of South African society. Unlike the Indian Supreme Court in the 1980s, however, it has not taken over this role itself. Rather, it has focused its attention on shoring up the constitutional institutions that make genuinely transformative democratic politics possible.

There are thus reasons to doubt that the Comaroffs’ account of the Constitution’s political and cultural effects would withstand sustained scrutiny. Nevertheless, their account has not been short of popularisers. In their 2008 book, *Precedent and Possibility*, Dennis Davis and Michelle le Roux drew on the Comaroffs’ work to comment on various aspects of contemporary South African constitutionalism. In 2019, they extended their argument in a revised edition of this book under a different title, with the concept of ‘lawfare’ now taking centre stage.

The introduction to the 2019 edition acknowledges the concept’s ambiguity. ‘Lawfare’, le Roux and Davis write, ‘should be understood as having a duality to it; it can be a good or a bad thing.’ Some of le Roux and Davis’s examples of this phenomenon, such as their reference to Hugh Glenister’s ‘tireless efforts’ in the Hawks matter, are thus clearly positive. Elsewhere, ‘lawfare’ is used to describe actions and social phenomena of which le Roux and Davis clearly disapprove, such as former President Jacob Zuma’s various attempts to use procedural devices to delay his prosecution on charges of corruption, and the various respects in which South Africa’s courts have allegedly ‘become the site of pure political contestation because politicians seek to usurp judicial powers to achieve their objectives’.

While their acknowledgment that ‘lawfare’ is an ambiguous term is welcome, le Roux and Davis do not offer us a normative theoretical framework for distinguishing between ‘good’ and ‘bad’ instances of the phenomenon. They also do not provide an in-depth analysis of whether there is anything that the courts or anyone else could do to mitigate lawfare’s harmful effects. In the absence of that, their book has very little to teach us. Constitutional systems that provide for judicial review require courts to decide politically controversial matters. The whole point of adopting such a system is to subject the exercise of political power to constitutional standards. Inevitably, that means that political disputes that previously would have been resolved by other means come to the courts. That this has been the consequence of the adoption of the Constitution is so unremarkable as to be almost not worth saying. The real question is what effects this is having on democratic politics, the legal system and ultimately the lives of ordinary people.

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49 In *Government of South Africa v Grootboom* [2000] ZACC 19, 2001 (1) SA 46 (CC), 2000 (11) BCLR 1169 (CC), for example, the Court famously left it to the legislature to fill the gap in South Africa’s housing policy that this case identified.
51 Le Roux & Davis *Lawfare* (note 17 above).
52 Ibid at 5. While the Comaroffs’ usage of the term is more consistently pejorative, both in their original 2001 article and in their later pieces, they do acknowledge the term’s two-sidedness. See, for example, John Comaroff’s explanation of the term ‘lawfare’ in a Youtube video (https://www.youtube.com/watch?v=skCRotOT1Lg).
53 Le Roux & Davis *Lawfare* (note 17 above) at 8.
54 Ibid at 7.
55 Ibid at 5.
South Africans. Thinking through this question requires sustained attention, a knowledge of the local and comparative literature, and some openness to empirical contradiction. None of those qualities is on display in le Roux and Davis’s book, which seems to have been written for a popular audience.56

Ordinarily this would not matter. But the success of le Roux and Davis in popularising the Comaroffs’ use of the term ‘lawfare’ means that it has entered public debate. Opinion pieces and media talk shows in South Africa are now awash with references to the term as though its meaning were clear and its descriptive accuracy uncontroversial.57 Worse than this, the term is being used in a way that plays into the hands of those who stand to benefit from a general perception that the judicial process has become politicised. It is therefore vitally important that this line of criticism be conceptually clarified and its specific claims tested.

Leaving aside its positive use as a term to describe instances where tenacious litigants use the Constitution to hold political actors to account (as in the Glenister/Hawks example), there seem to be at least three different phenomena that ‘lawfare’ describes, each of which is associated with a separate concern.

The first is a concern about the debilitation of democratic politics. This is the sense of the term associated with the Comaroffs’ critique of South Africans’ misplaced faith in the Constitution as the solution for all of the country’s problems. The essential idea here is that the Constitution works a diversionary effect — in promising to subject the abuse of political power to law it causes everyone to forget about other ways in which power may be contested and democratic struggles waged. Making matters worse, politics is channelled into an institution, the Constitutional Court, that cannot resolve the issues it is being asked to resolve. Thus, not only is democratic politics debilitated, but social conflicts continue unabated. Understood in this way, this concern connects to an older US civil rights literature about the perils of waging important political battles through the courts. It also resonates with an incipient critical South African literature about the way in which the Constitution has allegedly removed vital issues from democratic politics — sanitising and depoliticising them in ways that benefit the white minority and the continuation of neo-apartheid.

The second concern is the more familiar worry about the effect of the Constitution on the perceived independence of the judiciary. With so many politically controversial cases being decided by the courts, this concern goes, judges will inevitably be drawn into the political disputes that they are being asked to decide. While they might succeed in maintaining their independence as an objective matter, the fact that they are deciding so many politically controversial cases will likely make it difficult for them to maintain their reputation for independence as a matter of public perception. This, in turn, is likely to have knock-on consequences for their capacity to act as an effective check on the abuse of political power. Call this the politicisation of the judiciary concern.

The final concern is a combination and particularisation of the previous two. It is the worry that the opportunities that the Constitution provides for litigants to delay cases by taking

56 I say this because the book’s treatment of the scholarly literature is very superficial, with complex arguments (including those found in the Comaroffs’ work) reduced to soundbites and much of the local and comparative literature ignored. The book neither sets out a coherent, normatively grounded theoretical framework nor explores any particular thesis about the origins or effects of the phenomenon it describes.

57 See H Corder ‘Critics of South Africa’s Judges are Raising the Temperature: Legitimate or Dangerous?’ The Conversation (22 August 2019)(referring to ‘lawfare’ as the term now commonly used in South Africa to describe the tendency of ‘politicians and civil society’ to ‘turn to the courts’).
procedural points or appealing decisions all the way to the Constitutional Court allows corrupt or otherwise incompetent public officials to avoid accountability for their actions. This concern combines the first concern’s worry about political battles being fought through the courts with the second concern’s worry about the effect of all this on the perceived independence of the judiciary. But its focus is on how the judicialisation of politics/politicisation of the judiciary affects the proper functioning of the judicial system. Call this the abuse of the judicial process concern.

Part III examines these three concerns in the context of South Africa. It first elaborates on each concern and then asks in each case whether the concern is liable to being overstated.

III DRILLING DOWN ON THE THREE CONCERNS

A Lawfare as the debilitation of democratic politics

The first concern is about the way constitutionalism and judicial review allegedly divert political struggles into litigation, thus limiting other forms of democratic politics. While featuring in the Comaroffs’ work as an observation about post-apartheid South African society, this concern has a long pedigree. Its antecedents can thus be traced to debates in the 1970s and 1980s in the US, which still have echoes today, about whether the civil rights litigation of that era diverted attention away from the sort of bottom-up political mobilisation that might have achieved more thoroughgoing and long-lasting social and economic change.  

This controversy continues in the US today, with ongoing arguments, for example, about whether Roe v Wade, despite its support for abortion rights, has not in some way set back the cause of women’s freedom of choice. Had the case been delayed, one side contends, and the victory won in the court of public opinion, the current policy debate over abortion would be less polarised. Similar questions have been raised about the same-sex marriage line of cases, although in this instance the general view seems to be that public interest litigators, aided by a Supreme Court that was sensitive to changing public opinion, did far better. The key issue, it is now agreed, is how public interest litigation is conducted and how the results of any such litigation are fed back into the democratic process. While litigation may demobilise change-seeking groups by seducing them into thinking that courtroom victories amount to real social change, this is a problem that can be addressed through the careful choice of litigants and the sequencing of the issues litigated.

A full summary of this literature would require more space than is available here. For current purposes, the point is simply that the American experience shows that the claim that a constitution that provides for judicial review debilitates democratic politics is one that can be overstated. In probably the most sophisticated treatment of this topic, Gordon Silverstein has

58 Though much criticised, the locus classicus remains GN Rosenberg The Hollow Hope: Can Courts Bring About Social Change? (2nd Ed, 2008).
60 410 US 113 (1973).
62 Rosenberg Hollow Hope (note 58 above).
thus shown how the phenomenon of ‘juridification’ in the US sometimes amounts to ‘shaping’, sometimes to ‘constraining’, sometimes to ‘saving’ and only in certain instances to ‘killing’ off politics.63 This more nuanced picture casts doubt on the Comaroffs’ sceptical account of the effects of the Constitution. Without a more detailed study of the kind Silverstein conducted in the US, it is dangerous to make assumptions about the impact of constitutionalism and judicial review on the quality of democracy in South Africa. As we will see when we get to the Constitutional Court’s 2018 record, many of the effects Silverstein identifies are detectable in the South African setting. Even in those instances where judicial review kills off politics, it is not certain that this is not the normatively preferred result.

There is another version of the democratic debilitation critique, however, which is more specifically South African and more thoroughgoing. On this version, constitutionalism and judicial review do not just channel democratic politics into the courts, they close off democratic discussion of certain important political issues altogether. The main proponent of this view is Joel Modiri, who argues that the Constitution, in as much as it was conceived as a response to the specific problem of apartheid, deflects attention away from the longer-term cultural and material effects of colonialism in South Africa.64 What the Constitution did, Modiri thinks, was provide the basis on which a small section of the black community could be inducted into white society, largely on the latter’s terms. This conformed to the ANC’s reformist approach to the problem of settler colonialism. In its espousal of an essentially Western model of governance at the expense of indigenous African models, however, the Constitution perpetuated rather than addressed the injustices of South Africa’s 300-year colonial history.65

This argument’s indebtedness to the Comaroffs’ critique of the continuities between the way law was abused in the colonial state and its oppressive modalities in the post-colonial state is plain to see.66 Although he does not himself use the term, Modiri’s analysis has certain affinities with the lawfare critique. The Constitution, he thinks, is the main means through which Western cultural values, intellectual traditions and professional skills are valued over indigenous African values, traditions, and skills. Thus have ‘white lawyers, activists and academics emerged as the primary intellectual and moral custodians of constitutional democracy in South Africa’.67

Modiri’s argument deserves a careful, point-by-point response of the kind that Firoz Cachalia has provided.68 For my limited purposes here, however, it is not necessary to engage with his contentions at length. All that I need to show is that Modiri’s version of the lawfare critique, like the others considered in this article, is prone to overstatement.69 If I can do that, I will have created enough space for the project I want to pursue in this piece — an assessment of whether the lawfare critique is supported by an analysis of the Court’s 2018 record.

The first point is that social transformation — or decolonisation — is a fraught process, and that there are many forces beyond the Constitution that stand in its way. Thus, the fact

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63 Silverstein *Law’s Allure* (note 20 above).
65 Ibid.
67 Ibid at 311.
69 Modiri ‘Conquest’ (note 64 above) has little to say about the Constitutional Court and its jurisprudence apart from a few remarks about the possibility of realistic, non-Utopian ‘constitutionalisms from below’. Ibid at 323.
that South Africa remains in many respects untransformed/un-decolonised does not mean that the Constitution and the model of governance it supports are to blame. The argument has to focus on the institutions that the Constitution establishes, the kind of democratic politics that they enable and whether there is something about those two things that is anti-transformative.

The second point is that Modiri is obviously correct that the Constitution represents the ANC’s reformist tradition rather than a more radical Africanist understanding of the causes of the ongoing oppression of black South Africans. But that is because the ANC won the overwhelming majority of the votes at the first democratic elections. It is thus hard to see how a democrat could regret this fact. To be sure, the Constitutional Principles appended to the Interim Constitution restrained what the ANC could do. To that extent, the Final Constitution overrepresents the white minority’s interests. But by and large the constitution that South Africa has is the constitution that the ANC wanted it to have. The property clause, for example, was freely chosen by the ANC, and not required by the Constitutional Principles. Like the other provisions, it focuses on South Africa’s more recent, twentieth-century past rather than the entire period of its colonial history. The clause represents a pragmatic assessment in that sense of the extent to which the historical clock could be wound back. But this was a legitimate choice by a democratically elected party. It is therefore not one that should be regretted, but one that needs to be periodically re-evaluated in the light of experience — its merits and effects debated within the framework of democratic politics.

On that critical point, it is not clear that the Constitution does close down the sort of democratic discussion Modiri wants us to have. The Constitution has not prevented, as it turns out, the debate over the property clause or the need for a more thoroughgoing land reform process. Nor has the Constitution prevented the rise of the Economic Freedom Fighters (EFF), whose critique of the conditions of black South African life Modiri’s argument in many respects echoes. On the contrary, the Constitution has arguably preserved the democratic space for a party like the EFF to emerge.

It is of course possible that South Africans would have been debating the stubborn effects of settler colonialism sooner had the ANC not exerted such a great influence on the Constitution. But if Modiri is right about the importance of the longue durée, it is not clear that this would have left us in a better position. Whichever political party had controlled the constitution-making process, it would have been confronted by the ‘deep structures’ of South Africa’s colonial past. Even if the balance of political forces had been such that a more radical Africanist constitution had been adopted, this constitution, too, would have struggled with the challenge of converting its aspirations into meaningful social and economic change. Given South Africa’s declining terms of trade, its skills shortage, and all the other well-known reasons for South Africa’s lack of economic growth, it is not at all clear that such a constitution would have performed any better than the 1996 Constitution. At any rate, whether it did so or not would

71 Ex parte Chairperson of the Constitutional Assembly: In Re Certification of the Constitution of the Republic of South Africa, 1996 [1996] ZACC 26, 1996 (4) SA 744 (CC), 1996 (10) BCLR 1253 (CC) at para 72 (holding that ‘no universally recognised formulation of the right to property exists’ and implying that, even had the Final Constitution not contained a property clause at all, it would have survived challenge under the Constitutional Principles).
73 Modiri ‘Conquest’ (note 64 above) at 314.
have depended on its tendency to support wise policy decisions, implemented by an effective public service, operating under a government that enjoyed public support. In short, we would be in exactly the same position as we are today, save that the Constitution would not be the whipping boy for all of South Africa’s problems.

I hope that these brief comments are not seen as making light of the serious questions that Modiri raises. He has initiated a conversation that needed to be broached and which is already enriching public discourse. I am simply asking him to remain true to his laudable constitutional realism. If he thinks that too much faith has been placed in the Constitution as a vehicle for social and economic change, then he should not himself place too much faith in any other kind of constitution. What South Africa needs, as Cachalia argues, is a constitution that provides the framework for democratic social transformation.\textsuperscript{74} The Constitution arguably does all of that and more. At least, it is worth examining the extent to which it has been, and is being, used for these purposes rather than dismissing this possibility out of hand.

B Lawfare as the politicisation of the judiciary

The notion that the introduction of a system of judicial review, and particularly supreme-law judicial review, risks politicising the judiciary has a very long history. From the American legal scholar, Alexander Bickel’s identification of the ‘counter-majoritarian dilemma’,\textsuperscript{75} to Jeremy Waldron’s critique of judicial review as amounting to judicial majority voting,\textsuperscript{76} numerous commentators have been concerned about the moral justifiability of giving judges what amounts to a political function. As noted already, le Roux and Davis’s discussion of this issue adds very little to our understanding of how great the risk of politicisation is or whether it has been realised in South Africa. They cite almost no local or foreign literature on the topic, and their discussion consists of a rather random sampling of cases that they do not try to mine in support of any particular argument about whether we would be better or worse off without the Constitution. In the result, their argument boils down to noting that the adoption of the Constitution has drawn the courts into many politically controversial cases and that this potentially poses a risk to their institutional legitimacy.

The danger of overstatement in this case, this example suggests, is that scholars may confuse the new theatres that constitutional courts are asked to enter with the consequences for them as an institution. Clearly, the conferral of the power to review legislative and executive acts for conformance with a constitution means that courts may become embroiled in high-stakes political cases. But this is a separate question from whether they are in fact politicised in the sense of losing their independence, whether actual or perceived. The necessity of politicisation in the first sense — actual independence — depends on where you stand in the long-running debate over the determinacy of law and also on whether you think that the fact that constitutional adjudication involves the enforcement of abstract moral values means that it is more indeterminate than adjudication in other areas of law.\textsuperscript{77} This is a perennially

\textsuperscript{74} Cachalia (note 68 above).
\textsuperscript{75} AM Bickel \textit{The Least Dangerous Branch: The Supreme Court at the Bar of Politics} (2nd Ed, 1986).
fraught question that cannot be addressed here. But it is not, in any event, central to the lawfare concern. Whatever your stance is in relation to this debate, the fact that judges may not be able to prevent their private political views from influencing their decisions does not necessarily mean that constitutional courts will become politicised in the second sense, perceived independence, which is the real concern associated with the lawfare critique. This is because constitutional courts have developed numerous ways of preserving their reputation for impartial decision-making. The German Federal Constitutional Court, for example, successfully reworked that country’s discredited tradition of legal positivism into an approach to its mandate that has been described as ‘value formalism’. 78 This new way of presenting its decisions has enabled it to play a central role in political life in that country while maintaining its reputation as an impartial institution. Even the US Supreme Court, in respect of which the charge of politicisation is most frequently made, still enjoys relatively high institutional legitimacy ratings. According to one study, that is because the American public is able to distinguish the justices’ principled pursuit of their private political values from partisan political decision-making. 79 On the strength of these examples, the politicisation of the judiciary in the sense of a loss of perceived independence is clearly not an inevitable consequence of the adoption of a system of strong-form judicial review. The question in every case is how the court concerned responds to its mandate and whether it is able to maintain a reputation for legally motivated decision-making, or at least avoid getting a reputation for partisan political decision-making.

C Lawfare as the abuse of the judicial process

The concern here is that unscrupulous individuals will use the judicial process to avoid accountability for their actions. Clearly, this is a possibility, 80 but again the risks of this happening may be overstated. A mere increase in the number of cases in which public office bearers go to court is not indicative on its own that the judicial process is being abused. Many of these cases may be legally justified and some increase in the involvement of public office bearers in litigation is a welcome sign that the constitutional system is working. Indeed, were there no increase in the involvement of public office bearers in litigation, this would be in certain respects more worrying. Even if some of the cases that go to court might have been resolved politically, the fact that the courts are asked to become involved in them does not necessarily mean that their processes are being abused. As with the politicisation of the judiciary, much depends on how the courts respond and on whether the problem is so endemic as to overwhelm the judicial system.

In relation to the first possibility, the courts have a number of remedies at their disposal, such as the imposition of punitive costs orders or the issuing of arrest warrants, which allow them to sanction the taking of frivolous or irrational procedural points. In this way, they may

79 JL Gibson & G Caldeira, ‘Has Legal Realism Damaged the Legitimacy of the U.S. Supreme Court?’ (2011) 45 Law & Society Review 195 (finding that the American public accepts that the justices are influenced by their personal political ideologies, but nevertheless thinks that they maintain a ‘principled’ commitment to those ideologies that is above purely partisan politics).
be able to protect their processes from abuse. Once again, therefore, whether the risk that the lawfare critique identifies has been realised is an empirical question that depends, in this instance, on a careful assessment of what remedies the courts are using to protect the integrity of their processes and how effective they are proving to be.

At a certain point, to be sure, the problem of unscrupulous and unnecessary litigation by public office bearers may become so endemic as to overwhelm the judicial system. In India, for example, the legal process is being used to tie up political and commercial opponents in seemingly endless litigation, regardless of the merits of the case being pursued. In that instance, lawfare qua abuse of the judicial process is a real problem. But the Indian scenario is not the inevitable result of the adoption of a system of judicial review. It represents rather a failure on the part of the courts in that country to resist the abuse of their processes in this way.

Finally, even if it could be shown that there have been a significant number of instances in South Africa where politically powerful or wealthy litigants have delayed the onset of justice against them, this would not necessarily be grounds for questioning the wisdom of maintaining the Constitution. The worth of any governance system ultimately has to be assessed through some sort of cost-benefit analysis. That being so, the ability of well-connected or wealthy litigants to use litigation to avoid accountability for their actions may in the final analysis be a price that is worth paying for the benefits that a commitment to constitutionalism and judicial review delivers.

All three subdimensions of the lawfare critique are thus prone to overstatement. Rather than simply accepting this critique at face value, this means its claims needs to be tested in each case. The next section takes the first step towards doing this by summarising some of the main cases decided by the Court in its 2018 term.

IV THE CASES

The 52 cases decided by the Court in its 2018 term covered a wide range of issues, as indicated at the outset. It is not possible to analyse all of these cases here. The focus needs to fall on some reasonably representative subset that can be used to assess whether the three lawfare concerns are warranted. At the same time, our sample should not bias the analysis one way or the other.

With those criteria in mind, this section presents short summaries of two broad categories of case: (1) cases dealing with democratic rights and the functioning of constitutional institutions; and (2) cases dealing directly with questions of social transformation and historical (in)justice. This sample gives a fair opportunity for an assessment of the three specific concerns associated with the lawfare critique. The first category thus collects a number of cases involving public office bearers, allowing us to examine why they went to court and whether the charge that democratic politics is being diverted through the courts is warranted. At the same time, many of these cases were controversial, allowing consideration of the politicisation of the judiciary concern. Finally, if there were instances in 2018 in which public office bearers used the judicial process to avoid accountability, they are likely to appear in this batch.

The second category collects cases in which the transformation of South African society or issues of historical (in)justice, such as the land question, were either explicitly or indirectly

at issue. This sample allows us to look at the question of whether the liberal-constitutionalist frame that was allegedly used to decide these cases somehow reduced their scope so that larger issues of colonial injustice were not raised and/or indigenous cultural values suppressed. In the nature of things, focusing on matters that were litigated in court means that many dimensions of South Africa’s social and economic transformation process are left out of account. The assessment cannot capture the Constitution’s exclusionary operation in that sense. But, to the extent that certain issues of social and economic transformation were in fact raised in Court, the second category of cases allows us to examine how they were dealt with.

Within the space available in this section, I can only give a very brief summary of each case. The summaries do not attempt to cover all of the legal issues raised. Rather, I say just enough to provide a flavour of the case and to set up the assessment in part IV.

A Democratic rights and the functioning of constitutional institutions

1 My Vote Counts

*My Vote Counts* was a challenge under s 32 of the Constitution to the constitutionality of the Promotion of Access to Information Act 2 of 2000 (PAIA). The applicant, a non-profit company ‘founded to improve the accountability, transparency and inclusiveness of elections and politics in the Republic of South Africa’, argued that access to information on private funding of political parties and independent candidates was crucial to a fully informed vote. Private funders inevitably expect something in return for their support — if not actual policy influence then at least broad ideological loyalty. Voters need reliable information about these possible influences on the party or candidate they were voting for. Moreover, to be effective, such information has to be available, not just on request through the cumbersome procedure that PAIA provides, but through a permanently available and updated public record. PAIA’s failure to provide for such a record was fatal to its constitutionality.

In its decision, the Court confirmed the order of constitutional invalidity made at first instance by the Western Cape High Court. Informed voting, the Court agreed, required that information on political parties must not just be held by them but also be easily accessible to voters. When s 32 of the Constitution was read with s 7(2) (the state’s duty to respect, promote, promote and fulfil constitutional rights) and s 19 (the right to vote), it was clear that the state was under a duty ‘to pass legislation that provides for the recordal, preservation and reasonable accessibility of information on private funding’. While PAIA was to give effect to s 32, it was deficient in various ways. For one, it failed to provide for access to information on private funding of independent candidates because they did not fall under the definition of ‘private body’ in s 1 of the PAIA. While PAIA applied to political parties qua juristic persons, political parties were not required to have juristic personality. This, too, therefore constituted a gap in PAIA’s coverage. But the most serious problem, the Court held, was that

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82 Available at https://www.myvotecounts.org.za/what-we-are-about/
83 *My Vote Counts* (note 7 above).
84 *My Vote Counts NPC v President of the Republic of South Africa* 2017 (6) SA 501 (WCC).
85 *My Vote Counts* (note 7 above) at para 34.
86 Ibid at para 44.
87 Ibid at para 63.
88 Ibid at para 65.
PAIA is a requester not a recordal regime. In particular, ss 18 and 53 of PAIA made obtaining information on private funding harder than it should be.

For all these reasons, PAIA was constitutionally deficient. The gap in the legislative framework, the Court held, could be remedied either through the amendment of PAIA or through the enactment of another statute or some combination of these two things.\textsuperscript{89} What was important was that there be a legislative regime for the ‘holding, preservation and reasonable disclosure of information on private funding’.\textsuperscript{90} Beyond this, however, the Court was not prepared to specify what the regime should look like. Like the Western Cape High Court, it accordingly refused to grant the specific order that the applicant had requested, viz. that whatever legislative solution Parliament devised should provide for the ‘continuous and systematic’ recordal of information.\textsuperscript{91} That aspect of the order, the Court held, was unnecessarily intrusive on the legislature’s policy-making prerogatives. In their concurring judgment, Froneman J and Cachalia AJ agreed with this stance, but held that it was not compelled by separation-of-powers concerns.\textsuperscript{92}

\section{Mlungwana}

Like \textit{My Vote Counts}, \textit{Mlungwana} took the form of a facial challenge to the constitutionality of national legislation, this time s 12(1)(a) of the Regulation of Gatherings Act 205 of 1993, which requires the convenors of a public meeting of more than 15 people held for political purposes to give notice of the meeting to their local municipality.\textsuperscript{93} The applicants were members of the Social Justice Coalition (SJC), ‘a membership-based organisation operating within the City of Cape Town and its environs, including Khayelitsha’.\textsuperscript{94} The SJC, the Court noted, had been established to lobby for improved municipal services, such as the provision of clean and safe sanitation. In pursuit of these objectives, 15 members of the SJC had chained themselves to the entrance of the Cape Town Civic Centre. They were joined by other members of the organisation, bringing the demonstration within the definition of ‘gathering’ in s 1 of the Act. As prior notice of the gathering had not been obtained, all were arrested on charges of participating in an unlawful gathering. Subsequently, 10 were convicted of having convened the gathering without giving notice, while the charges against the others for participating in the gathering were dropped.

In a relatively straightforward judgment, the Court accepted the applicants’ main argument that the criminalisation of the failure to give notice of a gathering had a ‘chilling effect’ on the exercise of the right to freedom of assembly in s 17 of the Constitution.\textsuperscript{95} While s 12(2) of the Act did provide a defence on the basis that the gathering had been spontaneous, the applicants had not relied on this defence in their criminal trial and there was no obligation on them to do so.\textsuperscript{96} The case thus fell to be decided on the question whether s 12(1)(a) of the Act unjustifiably limited the right to freedom of assembly. Dismissing the state’s argument

\begin{footnotesize}
\begin{itemize}
\item \textsuperscript{89} Ibid at para 76.
\item \textsuperscript{90} Ibid at para 80.
\item \textsuperscript{91} Ibid.
\item \textsuperscript{92} Ibid at para 94.
\item \textsuperscript{93} \textit{Mlungwana} (note 4 above).
\item \textsuperscript{94} Ibid.
\item \textsuperscript{95} Ibid.
\item \textsuperscript{96} Ibid.
\end{itemize}
\end{footnotesize}
that s 12(1)(a) was a mere regulation rather than a limitation of the right, the Court moved to apply its five-factor limitations analysis. The right to freedom of assembly, the Court held, was an important right given both its systematic denial in the past and the role it plays in contemporary South African democratic politics. While the state had a legitimate interest in ensuring that this right was exercised with due regard to public safety and the police’s ability to monitor gatherings, the criminalisation of the failure to give notice was unduly restrictive. The threat of criminal sanction, given the severity of the consequences of conviction, was likely to deter many legitimate forms of protest. Against this, there were other ways in which the state’s legitimate objectives could be achieved without burdening the right to the same extent. In short, the problem was that the ‘fit’ between the objectives sought to be achieved and the sanction of criminalisation was not ‘tight’ enough. In the result, the Court struck down s 12(1)(a) with immediate effect, albeit limiting the application of its decision to the case at hand and all future cases.

3 Corruption Watch

Corruption Watch took the form of a challenge to the constitutionality of a settlement agreement offered to former NDPP, Mxolisi Nxasana, in return for vacating his office. The applicants were three NGOs that have been actively involved in many of the Court’s good governance cases: Corruption Watch, Freedom Under Law and the Council for the Advancement of the South African Constitution. Their application to the Court sought the confirmation of the North Gauteng High Court’s order invalidating the settlement agreement between former President Jacob Zuma, the Minister of Justice and Correctional Services and Nxasana in his then capacity as NDPP. In addition to invalidating the settlement agreement, the High Court had ordered the repayment of the settlement offer paid out to Nxasana (in the region of R17 million less tax), declared the subsequent appointment of Shaun Abrahams as NDPP invalid consequent on the invalidity of the settlement agreement, and invalidated two provisions of the National Prosecuting Authority Act 32 of 1998 (‘the NPA Act’) that allowed the President to extend the NDPP’s term after retirement and suspend the NDPP without pay.

The central issue in the case was whether the settlement agreement and the impugned provisions of the NPA Act compromised the constitutionally guaranteed independence of the NDPP and the National Prosecuting Authority (NPA). Section 179 of the Constitution requires there to be an independent prosecuting authority with the NDPP at its head but leaves the details to national legislation. While s 12(8) of the NPA Act provides for the NDPP voluntarily to vacate their office, it was agreed that this section was not applicable on the facts. Rather, the question to be decided was whether the settlement offer made to Nxasana compromised the independence of the institution. At the time of the offer, Nxasana had been facing an inquiry into his non-disclosure of a criminal conviction against him. As an alternative

97 Ibid.
98 Ibid at paras 61–69.
99 Ibid at paras 74–81.
100 Ibid at para 87.
101 Ibid at paras 95–100.
102 Ibid at para 101.
103 Corruption Watch NPC & Others v President of the Republic of South Africa & Others; Nxasana v Corruption Watch NPC & Others [2018] ZACC 23, 2018 (10) BCLR 1179 (CC), 2018 (2) SACR 442 (CC).
to proceeding with that inquiry, he was offered the opportunity to vacate his office in return for the payment of the salary to which he would have been entitled had he served his full ten-year term. While insisting on his fitness for office, Nxasana accepted the offer.

The Court held that the criminal justice system lies at the centre of a well-functioning constitutional democracy.\textsuperscript{104} For this system to work effectively, the NDPP and the NPA need to be entirely independent of the President. This constitutional scheme was threatened by the ‘carrot and stick’ method that President Zuma had used to force Nxasana out of office. Nxasana either had done what he was accused of doing or he had not. That question needed to be resolved through proper proceedings, failing which, the inquiry should have been terminated. Instead, by alternately threatening disciplinary action and then offering a massive payout as an inducement to leave office, the President had compromised the independence of the office.

The invalidity of the settlement agreement meant that Nxasana’s forced departure from office was constitutionally improper. His own conduct, however, in accepting the settlement offer while denying the allegations against him, also fell short of the standards expected of the NDPP.\textsuperscript{105} The just and equitable remedy, therefore, was that Nxasana should refund the payment made to him but not be re-instated as NDPP. Likewise, the subsequent appointment of Shaun Abrahams as NDPP was vitiating by the irregularity of the process that had proceeded it. Finally, the Court invalidated ss 12(4) and (6) of NPA Act in so far as they permitted the extension of the NDPP’s term of office beyond retirement age and the unilateral suspension of the NDPP without pay.\textsuperscript{106}

4 Helen Suzman Foundation

\textit{Helen Suzman Foundation} was about whether the deliberations of the Judicial Service Commission (JSC), in the execution of its mandate to advise the President on the appointment of judges, could be requested under rule 53(1)(b) of the Uniform Rules of Court.\textsuperscript{107} This question arose in the context of the Helen Suzman Foundation’s approach to the Western Cape High Court to review and set aside the JSC’s October 2012 decision advising the President on appointments to the Western Cape High Court. In the course of those proceedings, the Foundation had become aware that the JSC’s final deliberations had been recorded. It accordingly requested that these be made available in terms of URC 53(1)(b). (URC 53 applies to applications for review of proceedings inter alia of bodies performing administrative law functions. It provides for applicants in review proceedings to apply for the ‘record’ of such proceedings.)

The Supreme Court of Appeal (SCA) had held that applications under URC 53(1)(b) for release of the JSC’s deliberations should be decided on a case-by-case basis, weighing the need for full disclosure against protection of the confidentiality of the JSC’s deliberations (both so as to ensure the robustness of the discussion and also so as not to discourage future applications to the JSC). The Court, in its judgment, found this approach to be unnecessarily cautious. Stressing the importance of the judiciary to South Africa’s constitutional project,\textsuperscript{108} the Court

\textsuperscript{104} Ibid.
\textsuperscript{105} Ibid.
\textsuperscript{106} Ibid.
\textsuperscript{107} Helen Suzman Foundation \textit{v} Judicial Service Commission \[2018\] ZACC 8, 2018 (4) SA 1 (CC), 2018 (7) BCLR 763 (CC).
\textsuperscript{108} Ibid at para 32.
dismissed the JSC’s confidentiality concerns, both as they pertained to the robustness of its discussions and as they pertained to discouraging future applicants. The JSC was composed of people, the Court held, who should be prepared to stand publicly by any comments they made about candidates in the JSC’s deliberations. Likewise, for applicants, nothing could be more revealing of their character than the JSC interview itself.\textsuperscript{109} The fact that s 12(2) of PAIA disallows access to the JSC’s deliberations was irrelevant, given the different purpose of PAIA.\textsuperscript{110} The Court accordingly ordered release of the JSC’s deliberations under URC 53(1)(b), with precedential effect for all future such applications.

5 South African Social Security Agency

The South African Social Security Agency case\textsuperscript{111} was the latest in a long series of cases involving the payment of social assistance grants. The broad factual background is that the South African Social Security Agency (SASSA) administers the payment of social grants on behalf of the Department of Social Development. SASSA’s powers include the power to enter into contracts for the payment of the grants. A private company, Cash Paymaster Services (Pty) Ltd (‘CPS’), had been awarded the contract to pay social grants after a tender process, but this process had been declared invalid by the Court in 2013.\textsuperscript{112} Later, in 2014, the Court declared the contract between SASSA and CPS invalid and ordered that a new tender process be run.\textsuperscript{113} This order was suspended until 2017 to give SASSA enough time to award the new tender. After SASSA missed this deadline, an NGO, the Black Sash, successfully applied on an urgent basis to have it extended.\textsuperscript{114} When that extended order, too, threatened to expire without a new service provider in place, SASSA approached the Court on an urgent basis for a further extension.

The Court held that SASSA had been given ample opportunity to advertise and award the tender. The fact that the tender had not been awarded was thus largely due to its own failings. Ordinarily this would have been grounds for refusal of the application, but in this instance the interests of justice, and particularly the interests of social welfare beneficiaries, meant that the urgent application should be granted. After consideration, the Court decided not to impose a personal costs order against the Minister, Ms Bathabile Dlamini or SASSA’s acting CEO, Ms Pearl Bhengu, for their handling of the matter. Dlamini and Bhengu’s conduct, the Court held, though criticisable, fell short of the standard of bad faith and gross negligence required for such an order.

6 Black Sash 3

Black Sash 3 was decided one month after South African Social Security Agency.\textsuperscript{115} It is significant as the first case in which the Court ordered the payment of personal costs by a national government minister for conduct in the course of litigation associated with the performance

\textsuperscript{109} Ibid at paras 38–39.
\textsuperscript{110} Ibid.
\textsuperscript{111} Note 8 above.
\textsuperscript{112} AllPay Consolidated Investment Holdings (Pty) Ltd v Chief Executive Officer of the South African Social Security Agency [2013] ZACC 42, 2014 (1) SA 604 (CC), 2014 (1) BCLR 1 (CC)(‘AllPay 1’).
\textsuperscript{113} AllPay Consolidated Investment Holdings (Pty) Ltd v Chief Executive Officer of the South African Social Security Agency [2014] ZACC 12, 2014 (4) SA 179 (CC), 2014 (6) BCLR 641 (CC)(‘AllPay 2’).
\textsuperscript{114} Black Sash Trust v Minister of Social Development [2017] ZACC 8, 2017 (3) SA 335 (CC)(‘Black Sash 1’).
\textsuperscript{115} Black Sash Trust 3 (note 8 above).
of her duties. Whereas the Court in *South African Social Security Agency* had considered this question in the context of SASSA’s application to extend the suspension of its order, its decision in *Black Sash 3* related to the preceding litigation in which the Black Sash Trust had applied on an urgent basis to have the Court’s initial order extended. After granting the Black Sash Trust’s application in *Black Sash 1*, the Court had ordered that the Minister of Social Development show cause why she should not be joined to the proceedings and pay the costs thereof in her personal capacity. In response to that order, Minister Dlamini had tendered an affidavit that raised various factual disputes about what the Court referred to as a ‘parallel’ process of responsibility. After considering the existence of these disputes in *Black Sash 2*, the Court ordered that the Minister should be joined in her personal capacity and that a fact-finding inquiry be held into her conduct in terms of s 30 of the Superior Courts Act 10 of 2013. The inquiry, chaired by retired judge, Bernard Ngeoepe, found that Minister Dlamini had indeed appointed a parallel team of people to report directly to her rather than to the CEO of SASSA, and that she had not disclosed this fact in her affidavits tendered to the Court following its decision in *Black Sash 1*. In light of these factual findings, and further arguments before it, the Court held in *Black Sash 3* that Minister Dlamini should personally pay 20% of the costs of the Black Sash Trust and Freedom Under Law in bringing the original application. In so doing, the Court re-iterated its remarks in *Black Sash 2* that the common law provision for personal costs orders was now ‘buttressed by the Constitution’. Rather than breaching the separation of powers, the Court held, the awarding of personal costs against a national government minister was within its power to enforce compliance with the Constitution.

### 7 Law Society v President

*Law Society v President* concerned a constitutional challenge to former President Jacob Zuma’s participation in the decision-making process that led to the suspension of the operations of the Southern African Development Community (‘SADC’) Tribunal. The lengthy build-up to the case started with the Zimbabwe government’s policy of uncompensated expropriation of land owned by white farmers. After failing in Zimbabwe’s courts, a group of affected farmers took their case to the SADC Tribunal, which decided in their favour. Instead of taking steps to enforce the order, the SADC Summit, the organisation’s supreme body, resolved to frustrate the decision. This they did initially by refusing to appoint judges to the Tribunal, and

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116 A personal costs order was made against former President Jacob Zuma in *Republic of South Africa v Office of the Public Protector* 2018 (2) SA 100 (GP) after he delayed the establishment of a commission of inquiry into state capture that had been ordered by the Public Protector. See Corder & Hoexter (note 80 above) 116.

117 *Black Sash Trust v Minister of Social Development* [2017] ZACC 20, 2017 (9) BCLR 1089 (CC)(*Black Sash 2*).

118 *Black Sash 3* (note 8 above) at para 1.

119 Ibid at para 3.

120 Ibid.

121 Ibid at para 10.

122 Ibid.

123 *Law Society of South Africa & Others v President of the Republic of South Africa & Others* [2018] ZACC 51, 2019 (3) SA 30 (CC).


125 *Mike Campbell (Pvt) Ltd v The Republic of Zimbabwe* [2008] SADCT 2.

126 *Law Society* (note 123 above) at para 15.
then by adopting the 2014 Protocol on the Tribunal, which impermissibly used a simplified procedure to remove the Tribunal’s jurisdiction to decide on individual complaints against member states.\textsuperscript{127} In the North Gauteng High Court and then the Court, the applicants challenged President Zuma’s participation in these events as a violation of s 167(5) of the Constitution, and particularly of the obligations it imposes on the President to act lawfully, rationally and constitutionally in the exercise of his executive powers.

In a convoluted and at times difficult-to-follow decision that is fully analysed elsewhere in this volume,\textsuperscript{128} Mogoeng CJ dismissed the respondents’ preliminary argument that the case was premature as the Protocol had not yet been ratified by the South African Parliament or entered into force.\textsuperscript{129} Although courts should generally be reluctant to interfere in the internal procedures of Parliament, the Chief Justice held, there were crucial differences between the passing of legislation and the ratification of an international treaty. By signing the Protocol, the President exposed South Africans living in other SADC states and the citizens of those states to the possible violation of their rights were the Protocol later to enter into force. Signature of the Protocol also immediately signalled a shift in South Africa’s respect for human rights that could have serious repercussions for people living in the country. Finally, South Africa was bound under customary international law by art 18 of the 1969 Vienna Convention on the Law of Treaties, which precluded it from acting in a way that defeated the object and purpose of the Protocol. For all these reasons, there was an immediate threat to constitutional rights that needed to be remedied.

In relation to the main complaint, the Chief Justice held that the President’s actions in participating in the irregular amendment of the SADC Tribunal’s jurisdiction for purposes that ran contrary to the Constitution’s commitment to the rule of law and the right of access to courts were unlawful, irrational and unconstitutional.\textsuperscript{130} The President’s actions first violated the principle of legality because they ran contrary to South Africa’s international law obligations under the SADC Treaty.\textsuperscript{131} This appears to have been either because observance of the SADC Treaty’s amendment procedures was constitutionally required or because, by participating in the undermining of the Treaty, the President acted in bad faith and purported to exercise powers he did not have.\textsuperscript{132} Second, the President’s actions were irrational because he exercised his power to amend the Treaty in a manner that was not rationally related to the purpose for which the power was conferred.\textsuperscript{133} Finally, the President acted unconstitutionally by exercising his power under s 231(1) of the Constitution to sign an international treaty in a way that violated constitutional rights, and particularly the right of access to court.\textsuperscript{134}

\textsuperscript{127} Ibid at para 9.
\textsuperscript{128} See articles in this issue by S Samtani, D Tladi, and A Coutsoudis & M du Plessis.
\textsuperscript{129} Law Society (note 123 above) at paras 21–42.
\textsuperscript{130} Ibid at paras 46–85.
\textsuperscript{131} Ibid at para 53.
\textsuperscript{132} Ibid at para 56.
\textsuperscript{133} Ibid at paras 61–71.
\textsuperscript{134} Ibid at paras 72–85.
B Social transformation and historical (in)justice

1 Minister of Constitutional Development v South African Restructuring and Insolvency Practitioners Association

Minister of Justice and Constitutional Development v South African Restructuring and Insolvency Practitioners Association dealt with the constitutionality of a national government policy (‘the policy’) providing for the restructuring of the insolvency industry.\(^{135}\) The policy regulated the distribution of provisional sequestration work to insolvency practitioners on the basis of race and gender. In particular, the policy established four categories of insolvency practitioner by race and gender and mandated a rotational system for their appointment by the Master, with preference given to people from historically disadvantaged race and gender groups.

The Western Cape High Court and the Supreme Court of Appeal (SCA), in their consideration of the matter, had held that the policy was rigid, arbitrary and capricious and amounted to a prohibited quota system.\(^{136}\) The policy, the SCA held, unduly fettered the Master’s discretion to appoint trustees and was ultra vires to that extent. It also breached the principle of legality in as much as it failed to promote the interests of creditors under the Insolvency Act 24 of 1936.\(^{137}\)

While finding the policy unconstitutional, a majority of the Court disagreed with the SCA’s reasoning. For the majority in the Court, the problem with the policy was that its fourth preferential category grouped together white males and members of other race groups who had become citizens after 1994. This, the Court held, violated the principle established in Van Heerden\(^{138}\) that social transformation policies should be reasonably capable of achieving their desired outcome. Given the variety of measures to prevent the acquisition of citizenship by members of disadvantaged groups before 1994, the majority held, there was no rational reason why that date should have been used to discriminate between categories in the quota system.\(^{139}\)

In dissent, Madlanga J, with Kollapen AJ and Froneman J concurring, stressed that the policy only covered provisional sequestrations, leaving the administration of final sequestration orders to be dominated by white practitioners.\(^{140}\)

2 Rustenburg Platinum Mine v SAEWA obo Bester & Others

In this case, the Court set aside an order of the Labour Appeal Court (‘the LAC’) holding that the dismissal of a white employee for referring to a fellow employee as a ‘swart man’ (black man) was inappropriate.\(^{141}\) The LAC had based its decision (a) on the need to apply an objective test to determine whether the remarks concerned were racially derogatory; and (b) on

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\(^{136}\) South African Restructuring and Insolvency Practitioners Association v Minister of Justice and Constitutional Development; In Re: Concerned Insolvency Practitioners Association NPC v Minister of Justice and Constitutional Development [2015] ZAWCHC 1, 2015 (2) SA 430 (WCC); Minister of Justice and Constitutional Development v South African Restructuring and Insolvency Practitioners Association [2016] ZASCA 196; 2017 (3) SA 95 (SCA) (‘SARIPA SCA’).

\(^{137}\) SARIPA SCA (note 136 above) at para 65.


\(^{139}\) SARIPA (note 135 above) at paras 43–48.

\(^{140}\) Ibid at paras 61–104.

a factual finding that the respondent did not know his fellow employee personally. Applying those criteria, the LAC decided that, in context, those who had heard the respondent’s remarks should have understood that he was using the term ‘swart man’ in a purely descriptive sense.

On appeal, Theron J, on behalf of a unanimous Court, overturned the LAC’s decision. Applying a less strict version of the objective test that the LAC had applied, Theron J held that the LAC had misdirected itself in deciding the case on the basis of a defence that the respondent had never raised. The respondent’s argument, the Court held, was not that he had used the term ‘swart man’ as a descriptor but that he had never used the term at all. That assertion, however, had been contradicted by four witnesses and thus should not have been accepted as fact. Proceeding on the basis that the words had indeed been uttered, Theron J held that the LAC had also erred in failing to take into account that the context in which the words were uttered was that of a country with a history of racial discrimination. In that context, used in the way they were, the words were racially loaded. In considering whether dismissal was an appropriate sanction in light of that finding, Theron J took into account the fact that the employee had persisted in his denial of having used the words and had moreover engaged in further angry and abusive conduct during the hearing of the matter. In those circumstances, dismissal was justified. The respondent, like all South Africans, was under a duty to ‘embrace the new democratic order’ and treat his fellow employees with respect.142

3 Duncanmec (Pty) Limited v Gaylard NO & Others

This case concerned the lawfulness of the dismissal of nine members of the National Union of Mineworkers of South Africa (NUMSA) for racially offensive conduct.143 In the course of participating in an unprotected strike on their employer’s premises, they had sung an anti-apartheid struggle song containing the words (in isiZulu): ‘Climb on top of the roof and tell them that my mother is rejoicing when we hit the boer’.144 Their employer, the appellant, dismissed them on two charges of misconduct: for participating in an unprotected strike and for singing the song. This decision was subsequently reversed by an arbitrator, who ruled that the song was inappropriate but not racist, and that singing it did not warrant the employees’ dismissal.145

On review before the Labour Court, NUMSA argued on behalf of its members that the singing of the song was justified because the effects of apartheid were still being experienced in the workplace. While officially race neutral, South Africa’s economic structure still reflected past racial power imbalances.146 The Labour Court accepted this argument and upheld the arbitrator’s initial decision to order the employees’ re-instatement.

On appeal to the Court, Jafta J accepted for purposes of his judgment that the song was racially offensive. Nevertheless, he held, the arbitrator’s award was not unreasonable. In arriving at her decision, the arbitrator had taken account of the fact that the strike was peaceful, that the song was not racist when understood in context, and that the employees all had otherwise

142 Ibid at para 62.
143 Duncanmec (Pty) Limited v Gaylard NO & Others [2018] ZACC 29, 2018 (6) SA 335 (CC) (‘Duncanmec’).
144 ‘Boer’ is the Afrikaans word for farmer. It can be used pejoratively or non-pejoratively depending on the context.
145 Duncanmec (note 143 above) at paras 17–20.
146 Ibid at para 24.
clean records. As those three reasons were all rationally related to the outcome arrived at, the Labour Court had been correct on review in refusing to set the arbitrator’s award aside.\(^{147}\)

4 **Rahube v Rahube**

In this case, the Court struck down s 2(1) of the Upgrading of Land Tenure Rights Act 112 of 1991 (‘the Upgrading Act’) insofar as it automatically converted deeds of grant and rights of leasehold into rights of ownership. The Upgrading Act had been introduced by the National Party government in 1991 shortly before its departure from office. It was part of a package of reforms that was intended to shape, and to a certain extent pre-empt, any land reform measures that the incoming ANC government might introduce. As enacted, the Upgrading Act did not provide for any investigatory process prior to the conversion of a pre-existing right in land to ownership.

On the facts, the applicant had been living in the property concerned when her brother (the respondent) had been nominated by the family to be the holder of a certificate of occupation, which was later converted into a deed of grant. When the Upgrading Act came into effect, the applicant’s brother automatically became the owner of the land. The litigation commenced when the brother attempted to evict his sister from the property, some ten years after taking ownership. The challenge to the constitutionality of s 2(1) of the Upgrading Act was made in the course of the applicant’s efforts to resist eviction. After succeeding in the High Court, the case came to the Court for confirmation.

Before the Court, the central point in dispute was whether the Proclamation that had governed the award of the certificate of ownership to the respondent, the applicant’s brother, had a discriminatory operation along gender lines. In a unanimous judgment written by Goliath AJ, the Court held that it did. Reading the Proclamation in its historical context, Goliath AJ reasoned, it was clear that only men were capable of being the head of a household. This in turn meant that only they could be awarded certificates of occupation. Since the majority of existing rights holders were likely to be male, the provision in the Upgrading Act for automatic conversion of pre-existing rights to ownership, without a process of inquiry into how they had been acquired and who might be affected, violated the applicant’s right to gender equality in s 9(1) of the Constitution.\(^{148}\)

5 **Maledu & Others v Itereleng Bakgatla Mineral Resources (Pty) Limited & Another**

The final case considered in this review concerned a dispute between certain long-term, informal occupiers of land and two companies that had been granted rights to mine platinum and other minerals on the land.\(^{149}\) The applicants were members of the Lesetlheng community that had purchased a farm outside the town of Rustenburg in what is now the North West Province in 1919. Because of racially discriminatory laws applicable at the time, the land could not be registered in their ancestors’ names but was instead held in trust by the responsible minister on behalf of the Bakgatla-Ba-Kgafela community (of which the Lesetlheng community was just one sub-group). Ownership of the land subsequently passed to the tribal authority, which, together with the Minister of Rural Development and Land Reform, gave permission

\(^{147}\) Ibid at paras 50–52.

\(^{148}\) *Rahube* (note 9 above).

\(^{149}\) *Maledu* (note 9 above).
for mining operations to commence in 2014. After the applicants had initially obtained a spoliation order preventing the mining operations from going ahead, the respondent mining companies approached the Mahikeng High Court for an order evicting the applicants and their employees.

The High Court, in its decision, granted an eviction order on the grounds that the applicants were not the registered owners of the land and that the tribal authority was authorised to grant consent to the Minister to enter into an agreement with the respondents for the lease of the land for mining purposes. On appeal, Petse AJ held for a unanimous Court that the matter could be resolved without deciding who the rightful owner of the land was. It was enough that the respondent mining companies were required by s 54 of the Mineral and Petroleum Resources Development Act 28 of 2002 (‘the MRPDA’) to consult with either the owner or the lawful occupiers of the land before commencing mining operations. Whatever the outcome of the ownership dispute, the applicants at the very least were lawful occupiers of the land under the Interim Protection of Informal Land Rights Act 31 of 1996 (‘the IPILRA’), a post-apartheid statute that had been enacted to give effect to the constitutional property clause’s requirement of security of tenure. As holders of informal land rights under the IPILRA, they could not be arbitrarily deprived of their property, which meant in this case that they had to be consulted under s 54 of the MRPDA before the mining operations could commence. The Court accordingly overturned the eviction order granted by the High Court so as to permit the s 54 consultation process to go ahead.

V  ASSESSING THE LAWFARE CRITIQUE IN LIGHT OF THE CASES

Even this very quick summary of 12 of the 52 cases decided in the Court’s 2018 term gives an indication of the range, complexity and importance of the issues with which the Court was confronted. From ensuring the independence of the NDPP to overseeing the payment of social grants, the Court was asked to decide a number of politically salient cases. The sample is not, of course, entirely representative of what is going on in the judicial system or the extent of juridification of South African life more generally. The magistrates’ courts, the High Courts, the Supreme Court of Appeal and the Labour (Appeal) Court have dockets that are probably more reflective of the real state of affairs, and the sample’s focus on court decisions precludes analysis of the broader social, economic and cultural effects of the mode of governance that the Constitution enshrines. We should thus be cautious about drawing firm conclusions. Nevertheless, if the lawfare critique has any bite, we should see some evidence at least of its three main concerns: (1) the tendency of constitutional litigation to take the place of democratic politics; (2) a judiciary struggling to maintain its independence in the face of the controversial cases it is being asked to decide; and (3) the judicial process being abused by public office bearers. In fact, however, in relation to each of these three concerns, the evidence points the other way. The cases show a Court that is bolstering democratic politics, resisting politicisation, and sanctioning attempts to abuse its processes.

A  Debilitation of democratic politics?

There is no doubt that democratic politics in South Africa is dysfunctional in many ways. The ANC’s electoral dominance has meant that the real struggle for political power in South Africa occurs within that party, in ways that the Constitution can only partly regulate. After 25 years
of single-party rule, South African democracy is plagued by serious problems of patronage and corruption.\textsuperscript{150} At the same time, the ANC is so riven by factional disputes that it is no longer able to focus on, let alone deliver, a coherent programme of policy-driven social change.\textsuperscript{151} Instead, the ruling party has lurched from leadership struggle to leadership struggle, with each new year bringing a fresh set of corruption allegations and commissions of inquiry.\textsuperscript{152} On the side of the political opposition, the picture is not much better. The Democratic Alliance has had its own leadership battles and has generally been unable to shake its reputation as a minority-group party.\textsuperscript{153} Its vote slid for the first time in the 2019 elections and it appears to have maximised its appeal at around 20%. The EFF, on the other hand, was able to increase its share of the vote in 2019, from 6% to 11%.\textsuperscript{154} While it is still some way off from being able to govern in its own right, its growth, in combination with the DA’s steady share of the vote, is threatening the ANC’s absolute majority. The problem in this instance, however, is that the EFF’s populist policies offer little real prospect of generating the inclusive economic growth that South Africa needs.\textsuperscript{155} Without a new realignment in politics, the most realistic prospect is that the ANC will continue to contain the EFF’s populism by itself moving in that direction.

It is one thing, however, to say that South Africa’s democracy is dysfunctional in various ways, and another to say that the Constitution is responsible for this. All of the troubling features just listed have other obvious causes, such as the country’s racially skewed capital-ownership structure, which inhibits economic growth and job creation, and thereby provides a constituency for populist political parties to promote policies that will inhibit economic growth even further.\textsuperscript{156} More importantly as dysfunctional as South Africa’s democracy is, none of the dysfunctional features specifically associated with the lawfare critique is obviously present, even if we go beyond the 2018 cases. Thus, while opposition parties have been


\textsuperscript{151} M Jonas \textit{After Dawn: Hope after State Capture} (2019) (explaining the policy options to kickstart inclusive growth but acknowledging that the ANC is currently politically constrained in its ability to implement them).

\textsuperscript{152} The two most prominent recent commissions are the Judicial Commission of Inquiry into Allegations of State Capture (Zondo Commission), launched in August 2018 and still running as of September 2019, and the Mokgoro Commission of Inquiry into the conduct of Deputy National Director of Public Prosecutions, Nomgcobo Jiba and Special Director of Public Prosecutions, Lawrence Mrwebi (Mokgoro Commission).

\textsuperscript{153} At the time of the 2019 general elections, 62% of the DA’s parliamentarians were people who would have been classified white under the apartheid system, in a country where only 9% of the population would now be so classified. Former Western Cape provincial leader, Patricia de Lille, formed a new political party, Good, after she resigned from the party in October 2018.

\textsuperscript{154} In the 2019 general election, the EFF won 10.79% of the vote, an increase of 4.44% on its 2014 result. The Freedom Front Plus, Inkatha Freedom Party and African Christian Democratic Party also increased their share of the vote by marginal amounts. None of these parties represents a credible threat to the ANC, however.

\textsuperscript{155} The ANC’s embrace of the call for Expropriation Without Compensation (EWC), for example, is generally regarded as an attempt to head off the populist threat posed by the EFF.

\textsuperscript{156} Jonas \textit{After Dawn} (note 151 above) 111.
involved in many prominent cases over the last ten years, there is no sense in which they have been waging policy battles through the courts. Rather, these cases have been about asking the judiciary to ensure that constitutional institutions that are meant to control the abuse of public power indeed fulfil that function. Aside from political parties, this type of case has also been brought by civil society groups and NGOs whose pro-poor agendas are more or less in line with the ANC’s stated policy commitments. Thus, far from undermining democratic politics, constitutional litigation is being used to reinforce the democratic process and to hold the ANC to its own electoral promises.

The lawfare critique is also not made out in respect of the ANC’s internal leadership struggles. True, many of the cases that the Court has decided have been related to these struggles. All of the voluminous litigation around the NDPP, for example, has stemmed from a concern about the capacity of the NPA to perform its work independently in a situation where some of the people to be prosecuted are high-ranking ANC members. In addition, the cases about the fairness of provincial ANC elections directly affect the outcome of intra-party political struggles in a context where provincial leaders are playing a more prominent role in the party. In deciding these cases, however, the Court cannot be said to have usurped the ANC’s processes. Rather, it has acted to enforce existing procedural rules.

These features of the Court’s record, familiar to those who have been following its decisions over the last ten years, were again on display in 2018. The Corruption Watch case, for example, looks superficially like a case in which the Constitution diverted an internal ANC political struggle into the courts. The origins of this case may thus be traced back to the battle between Thabo Mbeki and Jacob Zuma for the ‘soul’ of the party — a struggle that continues today in the efforts of President Cyril Ramaphosa’s administration to combat corruption and prevent the resurgence of residual elements of the Zuma faction. As noted in part IIIA3, Zuma’s settlement offer to former NDPP, Mxolisi Nxasana, was made in the context of the on-again off-gain corruption charges against him. Nxasana, it is generally agreed, had proven insufficiently controllable by the Zuma faction, and thus needed to be replaced with the seemingly more pliant Shaun Abrahams. The outcome of the Corruption Watch case, in that sense, was crucial to Zuma’s ability to continue resisting prosecution, at least for the 10 years of Abrahams’s tenure.

157 For example, Democratic Alliance v President of the Republic of South Africa [2012] ZACC 24, 2013 (1) SA 248 (CC)(challenging the appointment of Menzi Simelane as NDPP); Economic Freedom Fighters v Speaker, National Assembly [2016] ZACC 11, 2016 (3) SA 580 (CC)(enforcing remedial action ordered by the Public Protector in the Nkandla matter); Zuma v Democratic Alliance & Others; Acting National Director of Public Prosecutions & Another v Democratic Alliance & Another [2017] ZASC 146, 2018 (1) SA 200 (SCA)(overturning the NPA’s decision to drop corruption charges against Jacob Zuma), Economic Freedom Fighters v Speaker of the National Assembly [2017] ZACC 47, 2018 (2) SA 571 (CC)(ordering the Speaker of the National Assembly to make rules regulating applications for the removal of the President under s 89 of the Constitution).

158 Corder & Hoexter (note 80 above) at 119.


160 Corder & Hoexter (note 80 above) at 113.

161 For example, Ramakatsa v Magashule [2012] ZACC 31, 2013 (2) BCLR 202 (CC).


164 For example, Pieter-Louis Myburgh, Gangster State: Unravelling Ace Magashule’s Web of Capture (2019).
Saying that the outcome of a case is important to one side’s prospects of success in an internal political-party battle, however, is crucially different from saying that the case took the place of ordinary democratic politics. In the Corruption Watch litigation, after all, the Court was not being asked to decide between the competing factions. Rather, the case was about whether the settlement agreement and certain provisions in the NPA Act undermined the independence of the NDPP. It was a case, in other words, in which the Court was being asked to protect the integrity of the institutions affected by the internal struggle and their capacity impartially to regulate it. Rather than diverting the internal struggle into the Court, what the Corruption Watch case did was to empower another constitutional institution, the National Prosecuting Authority, to play its designated role. At the same time, the case illustrates the way in which the Constitution provides avenues through which concerned civil society organisations, which are not party to the ANC’s internal disputes, can enliven the Court’s jurisdiction to protect South African democracy against the institutionally destructive consequences of the ANC’s electoral dominance.165

All of the other cases discussed in part III.A may be understood in the same way. My Vote Counts was about protecting the integrity of the democratic process against the corrupting influence of private political-party funding.166 Mlungwana illustrates the role that the Court is playing in keeping open the space for the sort of democratic politics — street protests — that the Comaroffs claim has been channelled into litigation.167 (In Silverstein’s terms,168 Mlungwana is an instance of law ‘saving’ this style of politics.) The decision in Helen Suzman Foundation, though immediately about whether the JSC’s deliberations could be compelled under URC 53, was ultimately about preserving judicial independence.169 Finally, South African Social Security Agency and Black Sash 3 were about enforcing ministerial accountability in a dominant-party democracy where the electorate does not routinely sanction non-performance.170 Collectively, these cases reveal the role that the Court is playing in shoring up the institutions and accountability mechanisms on which the democratic system depends. To be sure, there is some selection bias at play here — all of the cases just mentioned were included in the sample precisely for this reason. But this does not detract from the function that the Court is performing in these cases. When considered together with the fact that there were no instances of cases in which the Court’s decision discouraged more traditional forms of democratic politics, the sample provides powerful evidence that this aspect of the lawfare critique is unfounded.

165 In this journal, Sujit Choudhry argued that the Court, in order to counteract the ANC’s dominance, should explicitly develop a number of ‘anti-domination doctrines’. See S Choudhry “‘He had a Mandate’: The South African Constitutional Court and the African National Congress in a Dominant Party Democracy’ (2010) 2 Constitutional Court Review 1. Samuel Issacharoff, too, has argued that the Court should become more interventionist in this sense. See S Issacharoff ‘The Democratic Risk to Democratic Transitions’ (2014) 5 Constitutional Court Review 1. The Court’s 2018 Term reveals that the Court has been able to do this, not so much by developing the cross-cutting doctrines Choudhry called for, but by expanding the reach of its powers on a case-by-case basis, particularly under the doctrine of legality.

166 Note 7 above

167 Mlungwana (note 4 above).

168 Silverstein Law’s Allure (note 20 above).

169 Helen Suzman Foundation (note 107 above).

170 South African Social Security Agency (note 8 above) and Black Sash 3 (note 8 above).
Modiri’s more general critique — that the Constitution has taken the deep-structural effects of colonialism off the democratic agenda — is by its nature not something that an assessment of the Court’s case law can establish, one way or the other. The SASSA case, for example, is fairly inconclusive on the question of whether the Constitution provides a genuine framework for social and economic transformation or merely legitimates the unjust status quo. In holding Minister Dlamini to account for her mishandling of the second social grants tender process, the Court was attending to the integrity of a welfare programme on which millions of South Africans depend for their survival. It was therefore a case that was crucial to the stability of the post-apartheid political settlement. But this fact only counts as an argument in favour of the beneficial effects of the Constitution if you think that this political settlement was just or at least the closest approximation to a just settlement in the circumstances. If you do not accept that premise, the analysis is quite different. From a more critical perspective, South Africa’s extensive social welfare system would not be necessary if the racialised structures of ‘white monopoly capital’ had been broken down, thus freeing black South Africans to fend for themselves. On this view, the SASSA Court was simply tinkering at the margins. Its decision, as laudable as it may seem, did nothing to address the structural causes of poverty and unemployment in South Africa. Worse than this, by protecting the integrity of the social grants system, the Court unwittingly contributed to the legitimation of the post-apartheid political settlement, which (on the critical view) substitutes welfare for genuine social and economic change.

On its own, the SASSA case cannot be enlisted to settle this debate one way or the other. Everything depends on your normative ‘prior’, as American political scientists like to say.

The two land reform cases look similarly inconclusive. Rahube, as we have seen, took the form of an equality clause challenge to late-stage National Party legislation aimed at enabling black South Africans to upgrade their land tenure rights. In striking down s 2(1) of the impugned Upgrading Act, the Court’s decision corrected an obvious gender bias in the original policy. It showed, in that sense, how the Constitution can be used to overturn discriminatory land-titling programmes that predate the democratic era, thus preventing the perpetuation of past unjust policies. On the other hand, Rahube did nothing to address the racially based landholding patterns consequent on South Africa’s 300+ years of colonial land dispossession. That issue is regulated by the Restitution of Land Rights Act 22 of 1994, which is subject to the restrictive terms of the 1993 constitutional settlement. Likewise, the second land reform case, Maledu, did not address the ongoing problem of racially-based landholding...
patterns in South Africa. Rather, it enforced land rights that were acquired in 1919, after the main acts of colonial conquest had taken place.

But perhaps this concedes too much to the critical view. Constitutions, especially those committed to transformation, must perform to address current imbalances of social and economic power rather than their historic causes. In *Maledu*, the applicants’ access to land, as much as it depended on rights that were acquired after the main acts of colonial conquest had occurred, was threatened in the here and now, by two mining corporations that had been given permission to mine by the responsible tribal authority and the Minister of Rural Development and Land Reform. To that extent, the case pitted the descendants of a relatively well off, but still vulnerable, community against the post-colony’s new power holders — the ‘alliance of chiefs, black business partners and mining corporations’ that a recent critical-left analysis lists as one of the major social mechanisms in the ‘formation of a new black elite’. While *Maledu* might thus have done nothing about the causes of colonial land dispossession, it did address the new vulnerabilities that less well-connected black South Africans experience under the current ANC dispensation. In addition to the 38 applicants, the Land Access Movement of South Africa (LAMOSA), an NGO that represents the interests of communities dispossessed after 1913, joined the case as an *amicus curiae*. While denying LAMOSA’s application to introduce new evidence, the Court began its judgment by quoting Frantz Fanon (no less), on the importance of land to ‘colonised people’. *Maledu* is thus hardly an example of a case in which the Constitution elided the fraught history of land dispossession in South Africa. Rather, it provided a public forum for discussion of precisely the issue that the Comaroffs and Modiri allege the Constitution is silent about — the continuities between the colonial abuse of law and the ongoing social and economic marginalisation of black South Africans in the post-colony.

Likewise, the two ‘racially abusive language’ cases — *Rustenburg Platinum Mine* and *Duncanmec (Pty) Ltd v Gaylard* — illustrate the subtle shift in the balance of cultural power that the Constitution is driving in the South African workplace. In the first case, as we have seen, the Court upheld the dismissal of a white employee for referring to a black colleague by race, whereas in the second it held that the dismissal of black workers for singing a protest song that contained the racially insulting word ‘boer’ was unreasonable. The two cases are distinguishable on the basis that *Rustenburg Platinum Mine* involved a direct personal insult whereas *Duncanmec* involved racially offensive conduct in the course of a strike. But they are nevertheless indicative of the way in which the Constitution’s values are reaching down into day-to-day interactions like these to vindicate certain ways of behaving over others. It is alright for workers to sing a racially offensive struggle song if that is done to express their sense

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178 *Maledu* (note 9 above) at para 1, quoting Frantz Fanon *The Wretched of the Earth* (1963) 43.

179 Note 141 above.

180 Note 143 above.

181 See the discussion in *Minister of Justice and Constitutional Development & Others v Prince (Clarke & Others Intervening)* [2018] ZACC 30, 2018 (6) SA 393 (CC), 2018 (10) BCLR 1220 (CC), at para 65 of the racist overtones of the regulation of cannabis use and the concomitant denial of cultural rights. This theme has appeared in all the *Prince* litigation at both the High Court and Constitutional Court level.

182 See Joanna Botha’s article in this volume of the *Constitutional Court Review*. 
of oppression under what they perceive to be a racially exploitative economic system.\textsuperscript{183} It is not okay to refer to a colleague by race if that is done in the course of complaining about his conduct in a way that suggests that his behaviour was typical of persons of that race. These are fine distinctions at the intersection of labour law and cultural politics, but it is not obvious that the Constitution is not capable of assisting judges to make them. The charge that the Constitution ‘perpetrates’ an exclusively Western view of ‘cultural justice’\textsuperscript{184} is certainly not made out.

B Politicisation of the judiciary?

The best evidence of the claim that the Constitution has politicised the judiciary would be social survey data that reflects a general loss of confidence in the independence of the courts. In the latest Afrobarometer survey, however, 67\% of residents agreed or strongly agreed with the statement that ‘[t]he courts have the right to make decisions that people always have to abide by’,\textsuperscript{185} and 71\% agreed or strongly agreed that ‘[t]he president must always obey the laws and the courts, even if he thinks they are wrong’.\textsuperscript{186} This is hardly evidence of a judicial system that is widely perceived to be illegitimate.

In more qualitative terms, the number of public accusations by prominent politicians that the judiciary has been politicised has certainly increased. Whereas in the first 15 years of democracy this type of attack occurred relatively infrequently,\textsuperscript{187} there have been a number of fairly serious attacks in the last decade. The trend began with former President Zuma’s not-clearly-benevolently motivated 2012 inquiry into the impact of the Court’s decisions on social transformation\textsuperscript{188} escalated into attacks on individual justices, who have been openly accused of bias.\textsuperscript{189} In addition to the ANC, the political party that is fondest of this sort of rhetoric is the EFF, whose leader, Julius Malema, recently complained of ‘women judges’ who are supposedly ‘threatened by male white Afrikaner lawyers’.\textsuperscript{190}

The fact that such attacks have been increasing, however, does not mean that the courts have been politicised. Drawing this conclusion amounts to treating the making of accusations of politicisation as proof of their validity. Such a conclusion would not only be wrong. It would

\begin{footnotesize}
\begin{enumerate}
\item The Court in \textit{Duncanmec} (note 143 above) at para 6 acknowledges that the Constitution has thus far had limited impact on eliminating racism because of the difficulty of changing human behaviour. The National Union of Mineworkers of South Africa (NUMSA) argued that racist struggle songs were justified because of the ongoing economic effects of apartheid (at para 24).
\item Comaroff & Comaroff (note 33 above) at 540.
\item Ibid.
\item The only incidents of this sort from this period were former Health Minister Manto Tshabalala-Misimang’s threat not to obey the Court’s decision in the Treatment Action Campaign case if it went against the government and the ill-fated attempt in 2006 to amend the Constitution so as to give the Ministry of Justice more control over the courts. See C Albertyn ‘Judicial Independence and the Constitution Fourteenth Amendment Bill’ (2006) 22 \textit{South African Journal on Human Rights} 126.
\item Corder & Hoexter (note 80 above) at 124.
\item Ibid at 124–125.
\end{enumerate}
\end{footnotesize}
also be dangerous.\footnote{This problem also affects the otherwise more cautious account in Corder & Hoexter (note 80 above) in so far as they refer to the courts as a ‘casualty’ (at 120) of the process when it is in fact far from clear that they have been. This leads them into a more pessimistic analysis than is warranted.}

The obvious point about these attacks is that they are themselves political. In a situation in which the courts, along with the media, have at times been the only defence against the ANC’s slide into corruption, it is in the interests of those who might one day face criminal charges to attack the courts. The most troubling aspect of the use of the word ‘lawfare’ is that it feeds into these tactics. By describing both the benevolent and the abusive use of the courts in the same terms, the ‘lawfare’ critique encourages the very process of politicisation it purportedly seeks to guard against.

In addition to the absence of partisan-political influence on the courts,\footnote{The only publicly recorded instance of attempted partisan-political influence on the Court concerns the still unresolved allegation that Justice John Hlophe of the Western Cape High Court attempted to influence two of the judges in their decision in a matter involving former President Jacob Zuma. Whether those allegations are true or not, the point is that the judges concerned resisted whatever influence Justice Hlophe might have sought to exert.} there is also no evidence of the weaker, American form of politicisation, i.e. the influence of the judges’ personal ideological views on decision-making. That is largely because the Constitution, read in the context of its enactment, presents a much more coherent account of its animating values than the US Constitution. What American CLS scholar, Karl Klare, famously presented as a post-liberal ‘ideological project’ is simply the political ideology actually informing the Constitution.\footnote{Klare (note 47 above).} As such, judges in South Africa can enforce it through ordinary interpretive techniques.\footnote{T Roux, ‘Transformative Constitutionalism and the Best Interpretation of the South African Constitution: Distinction without a Difference?’ (2009) 20 Stellenbosch Law Review 258.} Unsurprisingly, therefore, it is hard to divide the current members of the Court into ideological blocs. Such disagreement as there has been, has been about differences over the scope of the separation of powers doctrine.\footnote{For an example of this in the Court’s 2018 term, see Froneman J’s concurring judgment, in which Cachalia AJ concurred, in My Vote Counts (note 7 above).} With a bit of effort, one could try to make something of this — to suggest, for example, that there are more and less executive-friendly factions of the Court, and that this has to do with their political loyalties or ideological affiliations. But there is no strong evidence of this. The Court’s differences over the scope of the separation of powers doctrine are more plausibly ascribed to disagreements about the Court’s appropriate relationship to the democratic branches and the balance to be struck between constitutional enforcement and respect for democracy.

In short, the atmosphere of alarm about the possible politicisation of the courts that the proponents of lawfare seem to want to foster is not borne out by the Court’s record and other evidence. Whether assessed quantitatively or qualitatively, the Court has maintained a reputation for law-governed adjudication. How has it done this?

As I have argued in more detail elsewhere,\footnote{T Roux The Politics of Principle: The First South African Constitutional Court, 1995–2005 (2013). See also R Dixon & T Roux ‘Marking Constitutional Transitions: The Law and Politics of Constitutional Implementation in South Africa’ in T Ginsburg & A Huq (eds) From Parchment to Practice: Challenges of Implementing New Constitutions (2020).} we should resist monodisciplinary political science accounts of the Court as engaging in political power-building strategies and think instead in interdisciplinary terms of the Court as being at the centre of two distinct social subsystems — law and politics — each with its own conception of legitimate authority. In
that setting, what the Court does — what all constitutional courts do in systems where law is relatively well institutionalised — is to negotiate the constraints that adherence to the rule of law in a settled legal tradition imposes while at the same time drawing on the legitimating effects of perceived adherence to the rule of law to resist attacks on its independence.\(^{197}\) Without attempting to be exhaustive, we can observe at least four ways in which the Court did this in its 2018 decisions.

1 **Main posture: legalism**

‘Legalism’ as used here is a legal-cultural ideology that emphasises law’s autonomy from politics. I say ‘ideology’ because legalism is best understood as a cluster of ideas about the nature of law that has the power to legitimate the exercise by a court of its functions. Its success depends on inculcating in the public a certain faith in law — not the ‘fetishized faith’ that the Comaroffs allege certain people have in the Constitution’s ability to solve all of South Africa’s problems, but a faith in the capacity of law to act as a counterweight to politics. Legalism as an ideology in this sense is propagated in the public sphere in various forms. As far as the Court is concerned, it consists in the claim underlying each of its decisions, as it works its rhetorical effects, that the outcome was mandated by law and not by politics. Understood in this way, legalism is both an ideology and an umbrella term for a range of reasoning techniques through which the Court demonstrates that law provides a separate and distinct form of reasoning which is politically impartial — that for all of the political controversy of the questions put to it, once these questions are considered in court, they are converted from political into legal questions.\(^{198}\)

Every decision that the Court takes is replete with these techniques, but the way that they convert political questions into legal questions is so taken for granted that we are mostly unaware of what the Court is doing. Take, for example, the *Corruption Watch* case.\(^ {199}\) As noted in part IV, the political subtext of that case was that Shaun Abrahams was seen as a generally more pliant NDPP than Mxolisi Nxasana. The political importance of the case, in that sense, had to do, not so much with whether President Zuma would be sanctioned for authorising the settlement agreement entered into with the latter, but with whether his subsequent appointment of Abrahams would stand. As a legal matter, the choice between these outcomes hinged on the Court’s approach to the question of whether the invalidation of Nxasana’s settlement agreement necessarily vitiated the appointment of Abrahams. Two alternative possibilities were at issue, first that Nxasana himself should return to office, and second, that Abrahams, having been appointed in consequence of, but not having been involved in, the settlement agreement, should continue as NDPP.

In argument, the Court was asked to apply the SCA’s decision in *Oudekraal* to the effect that administrative action ‘continues to exist in fact and has legal consequences that cannot simply be overlooked’ until it is set aside by a court in review proceedings.\(^ {200}\) On one possible interpretation of that holding, the invalidation of Nxasana’s settlement agreement, having

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\(^{197}\) For a closely related philosophical exposition of this idea, which draws on my work on South Africa, see R Mann ‘Non-Ideal Theory of Constitutional Adjudication’ (2018) 7 *Global Constitutionalism* 14.

\(^{198}\) This understanding of legalism was succinctly expressed by Australia’s leading High Court judge, Sir Owen Dixon, on the occasion of his swearing in as Chief Justice in 1951.

\(^{199}\) *Corruption Watch* (note 103 above).

\(^{200}\) *Oudekraal Estates (Pty) Ltd v City of Cape Town* [2004] ZASCA 48, 2004 (6) SA 222 (SCA)(as cited and paraphrased by the Court in *Corruption Watch* (note 103 above) at para 31).
taken place after the appointment of Abrahams, should have had no effect on it. The SCA, however, had clarified its holding in Oudekraal in Seale to make it clear that it was only administrative action that depended on the factual existence of the prior administrative acts that remained valid, and even then only until the prior administrative act was invalidated.201

The Court had endorsed this reading of Oudekraal in Kirland.202 After summarising this line of cases, the Court was thus able plausibly to say that the law in the form of its prior decisions, consistently applied, dictated the invalidation of Abrahams’ appointment.

There is no mystery in any of this. The Court is not manipulating the law in any great way to achieve these legal truth effects. It is, for all intents and purposes, just doing doctrine — parsing judicial dicta, distinguishing cases where necessary, and applying plausible readings of past decisions to decide current controversies. Charges of the necessary politicisation of the judiciary under a system of judicial review, however, often seem to be premised on a radically rule-sceptical account of law, such that any attempt on the part of a court to present its decisions as legally motivated is bound to be found out for the noble lie that it is. The Corruption Watch case and others like it in the Court’s 2018 term illustrate that this account underestimates the ability of judges to legitimate the exercise of their authority. Legalism has the ideological resources, South African legal-reasoning conventions, and the techniques to convincingly translate controversial political questions into legal questions.

2 Particularising the universal and universalising the particular

Aside from resisting the appearance of politicisation through plausible application of its own doctrines, how does the Court confront the particular critique that the Constitution’s rights are Western rights? On this version of the critique, no amount of doctrinal work can blunt the charge that the Court is essentially enforcing an alien value system. Indeed, the more ably the Court enforces that value system as a matter of legal technique, the more reliably it acts as an agent of Western cultural values.

The Court has not addressed this aspect of the lawfare critique head on in its judgments. Rather, what it has done has been to locate notionally universal human rights in the specific history of South Africa’s struggle against apartheid and in the ongoing furtherance of what it refers to as ‘our constitutional project’.203 Thus, in Mlungwana, for example, the Court traced the origins of the right to peaceful assembly back to the denial of this right before 1994.204 It then went on to demonstrate the contemporary relevance of this right to protests over municipal service delivery — thereby suggesting that the right to peaceful assembly is not an alien Western right but a right that emerged out of South Africa’s own, unfinished tradition of struggle against the abuse of political power.205 None of these passages is strictly speaking doctrinally required. Rather, they are intended to work a certain rhetorical effect in legitimating the work that the Court is doing.

203 My Vote Counts (note 7 above) at para 52.
204 Mlungwana (note 4 above) at paras 64–67.
205 Ibid at para 69. In similar vein, the Court in Law Society (note 123 above) at para 4 bolstered its extensive reliance of international law by stressing the role that international law had played in ‘expos[ing] the barbarity and inhumanity of the apartheid system of governance’.
To be clear: I am not suggesting that these passages are deliberately intended to counteract the Western values critique, only that they tend to have that effect. In the face of the charge that the rights in the Bill of Rights are faux universal rights that act as a Trojan horse for Western values, the Court reminds us that they were fought for during the anti-apartheid struggle. Having been won, they remain relevant to the implementation of a Constitution that is presented as the continuation rather than the negation of that struggle. In this way, notionally universal rights are given a South African flavour, indigenising them and demonstrating their relevance to contemporary democratic politics.

In *My Vote Counts*, by contrast, many of the Court’s arguments about the need for legislation to require the recordal and disclosure of private funding to political parties could have been made in any liberal constitutional democracy. The Court is here appealing to emerging global best practice on the conditions for free multiparty competition. While there are several references to the danger of corruption that undisclosed political party funding poses, these remarks are not particularised to the challenges that South Africa faces. Rather, they are kept at a fairly general level, portraying this form of corruption as a universal problem that all constitutional democracies face. The Court’s approach in this instance could be said to be exactly the opposite of that deployed in *Mlungwana* — ‘universalising the particular’ so as to demonstrate that the rights in the Bill of Rights, though emanating out of South Africa’s own political experience, have broad international recognition and salience.

3 Comparative and international law

Closely related to the previous adjudicative techniques is the Court’s ongoing practice of bolstering its decisions with references to foreign law. In *My Vote Counts*, the Court thus quoted a long extract from the US Supreme Court’s decision in *Buckley v Valeo*. The emphasis that the Court placed on this decision was slightly odd given the US Supreme Court’s reputation as a court that has failed properly to address the influence of moneyed interests in politics. But the point seems to have been partly to convey the universality of the problems South Africa faces and partly to draw on what the Court took to be a helpful setting out of the link between private funding disclosure requirements and the prevention of electoral corruption. In other cases, the Court makes a point of referring to the case law of ‘progressive constitutional democracies’ so as to explicitly locate its jurisprudence in an emerging international consensus about the role played by rights in the protection of the preconditions for genuine democracy.

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206 Note 7 above.
207 Ibid at paras 45–52. The Court cites both the UN Convention against Corruption and African Union Convention on Preventing and Combating Corruption (at paras 49 and 50).
208 Perhaps because, until the recent Public Protector investigation into the funding of President Cyril Ramaphosa’s ANC presidential election campaign, this problem had not received widespread media coverage.
210 *Mlungwana* (note 4 above) at para 69 with accompanying citations to the UNHRC (Finland) and ECHR (Russia).
211 See also *Prince* (note 181 above) at paras 54–57 and 70–75 (referring to a range of approaches in foreign law to the criminalisation of marijuana use).
4 Commonsense ethical standards rather than moral philosophy

The final adjudicative technique worth commenting on involves the way that the Court in its 2018 term appealed to commonsense ethical standards as opposed to presenting the Constitution, as it used to do, as an ‘objective normative order’.²¹² Partly this has to do with the changing composition of the Bench and the changing nature of the cases. It has been a while since the Court had a Germanophile among its members, and most of the cases it today hears do not involve questions of collective political morality,²¹³ such as the constitutionality of the death penalty, but rather the moral probity of individual conduct. In that changed setting, one would expect commonsense ethical standards to come to the fore. But it is still striking how the Court, in cases such as Corruption Watch,²¹⁴ seems to base so much of its reasoning, not on complex theorisations of the Constitution’s underlying value system, but in simple statements of what the morally correct thing to do is in the circumstances was.²¹⁵ We should be cautious about overthinking this or suggesting that this is a deliberate strategy of sorts, but there are obvious advantages for the Court, given the Western values critique, in presenting its decisions as the enforcement of commonsense, everyday ethical standards. One of the oft-repeated charges against constitutional judicial review is that it invites judges to substitute their subjective views of how the constitution’s value system ought to be understood for that of the democratic branches — in the process acting politically. The Court’s commonsense ethical standards approach deflects this charge by appealing directly to South Africans’ moral outrage about the way public funds are being misspent or political power is otherwise being abused.

C Abuse of the judicial process?

While several cases in the sample provide evidence of lengthy appeals processes, particularly those involving labour matters,²¹⁶ there is only one 2018 case that suggests that public office bearers, litigating at taxpayers’ expense, may be able to use the legal process to avoid accountability. That case, of course, was the South African Social Security Agency case,²¹⁷ the latest in a long line of cases arising from the ongoing saga of the social welfare grants payments crisis. The potential abuse of the judicial process at issue in this case had to do with the way the former Minister of Social Development, SASSA and Cash Paymaster Services (Pty) Ltd were effectively able to hold the Court to ransom by repeatedly failing to implement its orders or by bringing last-minute urgent applications to extend them. This tactic put the Court over a barrel because it was not in a position to order the termination of the services in the absence of an appropriate alternative service provider, for reasons largely of the Minister’s and her administration’s making. In its decision in South African Social Security Agency, the Court considered but, in the end, did not impose a personal costs order against the former Minister (Bathabile Dlamini) and the acting CEO of SASSA (Pearl Bhengu) as a sanction for their misconduct. While finding that the Minister did not perform an ‘effective supervisory role’, the Court held that her conduct did not meet the standard of bad faith or gross negligence.

²¹³ One exception here is Prince (note 181 above).
²¹⁴ Note 103 above.
²¹⁵ In addition, see also Law Society (note 123 above) at paras 1–3.
²¹⁶ Ibid.
²¹⁷ Note 8 above.
required for the imposition of a personal costs order.\textsuperscript{218} The Court took a different approach in \textit{Black Sash 3},\textsuperscript{219} however, on the strength of the Ngoepe Inquiry’s findings.

Far from allowing its processes to be abused, these two cases suggest that the Court is starting to develop remedies that will prevent public office bearers from avoiding accountability. In 2019, these remedies were already being used to sanction the Public Protector, who some allege is abusing her office for partisan-political purposes.\textsuperscript{220}

\section*{VI CONCLUSION}

In summary, none of the three aspects of the lawfare critique is borne out by the Court’s 2018 term. There is no sense in which the cases decided by the Court in 2018 displaced democratic politics, drew it so far into politics that it was unable to maintain its independence, or abused the judicial process in ways that the Court was not able to manage. In fact, if there is a common theme in the twelve cases discussed in this article, it is the way in which the Court is continuing to shore up and defend constitutional institutions that are required to protect South Africa’s democracy. In the face of a ruling political party that it can no longer unproblematically treat as a partner in the implementation of the constitutional project, the Court has signalled to minority political parties and civil society actors that it is willing to entertain cases aimed at reinforcing the integrity of the democratic process.

One way of interpreting this development is to say that the ANC’s moral implosion as a political party has resolved the ‘counter-majoritarian’ dilemma that is ordinarily associated with strong-form judicial review.\textsuperscript{221} The extent of corruption and maladministration in the ANC means that the Court is no longer confronted by an internationally celebrated political party, with clear social transformation plans, backed by an overwhelming democratic mandate. Instead, it is having to enforce the Constitution in the context of a faltering government that has in many respects lost its way. In that setting, rather than taking over the role of agent of social transformation, as the Indian Supreme Court did in the 1980s,\textsuperscript{222} the Court has focused its efforts on protecting democratic institutions so that they can properly drive the constitutionally imagined social transformation process once again.

The Court’s approach in this respect conforms to the conventional understanding of the legitimate role of constitutional courts in liberal constitutional theory. Liberal constitutionalism generally puts its faith in institutions and their ability to control and discipline human behaviour. In so doing, this approach to governance does not assume that constitutions are capable of solving all of a society’s problems. Rather, it assumes that the role of a constitution is to enable well-meaning actors within a society to contribute to the solution of its problems, and to provide a method of sanctioning political actors who do not have the public interest at heart in this sense. The Court is right to stick to this understanding of constitutionalism and of its own role in democratic politics. The current attacks on the Constitution stem, not from the fact that this understanding is misguided, but from the fact that the Court’s role in ensuring that the democratic process functions properly is only part of the story. On the one

\textsuperscript{218} Ibid at paras 46–47.
\textsuperscript{219} Note 115 above.
\textsuperscript{221} Bickel (note 75 above).
\textsuperscript{222} The best recent discussion of this phenomenon is A Bhuwania \textit{Courting the People: Public Interest Litigation in Post-Emergency India} (2017).
hand, the Court cannot on its own ensure that democratic politics is directed towards public-interested behaviour if the electorate is not prepared to vote partisan, incompetent or corrupt public office bearers out of office. On the other, the Court’s efforts will bear little fruit until the global economic order is controlled by genuinely public-interested institutions. Until those two problems are resolved, the Court and the Constitution more generally will continue to be blamed for an outcome — the relatively slow progress of social and economic transformation in South Africa — that is largely beyond their power to control.
Judicial Appointments in India: From Pillar to Post

ARGHYA SENGUPTA & JAY VINAYAK OJHA

ABSTRACT: After more than two decades of relative harmony between the executive and the judiciary, judicial appointments first became an openly contentious issue in India in 1973. In this article, we trace this history, beginning with an examination of the supersession crisis itself and continuing through an analysis of the judicial decisions in the three ‘Judges’ Cases’ of 1982, 1993, and 1998. We then examine in detail the proposed National Judicial Appointments Commission of 2014, and the Supreme Court’s negative response to it. We draw out from this history four broad design principles which ought to be borne in mind when designing a system of judicial appointment under a democratic constitution. We conclude that the level of democratic control of appointments should be proportionate to the extent of judicial power; that no judiciary can be so trusted as to be entirely self-perpetuating; that the political executive must remain an integral part of the appointments process; and that a balance must be struck between the need for transparency and certain advantages that accrue from a degree of confidentiality. These principles are informed not only by the fraught history of judicial appointments in India but also by debates over judicial appointments in other jurisdictions, particularly South Africa, where controversies about judicial appointments have become increasingly frequent.

KEYWORDS: Constitution of India, Judges’ cases, judiciary, National Judicial Appointments Commission, NJAC

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II INTRODUCTION

On 4 February 2020, the Constitution of the Republic of South Africa, 1996, had completed 23 years of functioning as the country’s founding charter. Throughout this period, the function of the Judicial Service Commission (JSC) in appointing judges to key courts in the country has been the subject of intense scrutiny. Though no concerted action has been taken to reconsider the existence of a commission-centric appointment process, calls for reform within the broader JSC structure have been widespread.¹ They have focused on the need to depoliticise the JSC; ensure proper criteria for selection and non-selection of candidates; and redress gender inequalities in the composition of the judiciary.

In the first 23 years of the operation of the Constitution of India, however, the appointment of judges to the Supreme Court and High Courts has remained publicly uncontroversial. The provisions relating to the appointment of judges in the Constitution of India are unambiguous — appointment is an executive function, exercised in consultation with the judiciary;² the convention of deferring to the view of the Chief Justice of India is widely accepted;³ and persons who are appointed are considered individuals of integrity, above the hurly-burly of political machinations.⁴

Privately however, murmurs of unprincipled appointments are often heard. In 1955, Jawaharlal Nehru, the first Prime Minister, is said to have recommended either Judge BK Mukherjea or Judge MC Chagla as Chief Justice of India, instead of Judge MP Sastri, who would have been appointed under the seniority convention.⁵ Extraneous factors relating to caste were viewed as influential in securing High Court appointments;⁶ and a few judges who were appointed were later considered unsuitable, necessitating their transfer from one High Court to another.⁷

The first two decades after independence themselves were characterised by a healthy mutual respect between the three branches of government. The Supreme Court, while vigilant in protecting fundamental rights,⁸ was largely deferential to the wisdom of Parliament; constitutional amendments were routinely rendered immune to challenge; and the heady sense of a joint enterprise of responsible nation-building was palpable.⁹

This delicate balance was decidedly upset on 25 April 1973, when three senior judges of the Supreme Court, Justices Shelat, Hegde and Grover, were superseded, and the executive appointed a junior judge, Justice AN Ray, as Chief Justice of India. This breached the

² Articles 124 and 217 of the Constitution of India.
⁶ Law Commission of India Reform of Judicial Administration (Law Com 14, 1958).
⁷ P B Gajendragadkar To the Best of My Memory (2014).
⁸ The Court was particularly vigilant about the right to free speech, trade and commerce, and the right to property. There were a few arguable exceptions regarding the scope of the right to life and personal liberty where the Court gave Parliament a wide berth; one oft-cited example is the case of AK Gopalan v State of Madras 1950 AIR 27. See G Austin Working a Democratic Constitution: A History of the Indian Experience (2003) 58–60.
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II COMMITTED OR OMITTED\textsuperscript{13}: THE SUPREME COURT AT 23

The debates in the Lok Sabha (the lower house of Parliament in India) on 3 and 4 May 1973 in the immediate aftermath of the supersession of judges turned on a single question — how political did the Members of Parliament consider the Supreme Court to be? Parliamentarians from the government and other parties supporting the supersession of judges expressed the view that the Supreme Court is always political — such is the nature of law — and thus methods of appointment ought to be geared towards securing substantive political goals. Opponents adhered to the widely held view of constitutional adjudication — judges of the Supreme Court, even in decisions with significant political ramifications, are engaged in interpreting the Constitution. Interpretation is a legal exercise carried out in accordance with established canons and precedents. Thus, while appointing judges, it was both impermissible and undesirable to choose judges on the basis of their political leanings. In essence this was a debate about the nature of judicial decision-making itself and to what extent legal interpretation was influenced by ideology.

Leading the charge for the government, Mohan Kumaramangalam openly declared that seniority was an unsuitable criterion for making an appointment to the office of the Chief Justice of India. It was not the way in which similarly high offices in the Army or the Union Public Service Commission were filled. Further, it reduced the possibility of becoming Chief Justice to a matter of chance that was determined merely by who had been appointed to the Supreme Court first. Instead Kumaramangalam proposed four normative objectives for the appointment of the Chief Justice: first, there must be continuity in leadership in the Court; seniority, which led to very short tenures, would therefore be unsuitable. Second, a judge need not be innocent of political views when appointed; instead, her views on public affairs and philosophy towards the country and to life generally, were critical. Third, certainty and stability in the law were critical for the highest court and any appointment had to reflect this. Finally, it was open to the government to select the person who met the aforementioned criteria; a person, who, in his words, had the most suitable ‘philosophy and outlook’\textsuperscript{14}.

Kumaramangalam’s first three points are unobjectionable. The first — the need for continuity in leadership — is a basic principle of managing any public or private institution. For the office of the Chief Justice of India, owing to the seniority criterion, the average tenure of a Chief Justice today is 13 months.\textsuperscript{15} At the time Kumaramangalam was speaking, it was approximately two years. In fact, this point was noted by the 14th Law Commission, which commended the stability brought about by Chief Justices enjoying reasonable tenures.\textsuperscript{16}

His second and third points — assessing the outlook of a judge towards law and life and the need for certainty and stability in the law when considered outside any specific individuals, also appear innocuous. Appointment of a Chief Justice who can lead the judicial institution ought to be based on certain substantive criteria. Such criteria should ordinarily be declared,

\textsuperscript{13} Lok Sabha Debates Discussion Re: Urgent Need for Judicial Reforms col 399 (14 May 1985) speech of Prof. Madhu Dandavate.

\textsuperscript{14} Lok Sabha Debates, Discussion Re: Appointment of Chief Justice of India col 377 (3 May 1973) speech of Mohan Kumaramangalam.

\textsuperscript{15} Vishnu Padmanabhan & Sriharsha Devulapalli ‘How the Supreme Court Has Evolved since 1950’ LiveMint (15 August 2018), available at https://www.livemint.com/Politics/iK7w9InnxqgsELzcf26HRN/How-the-Supreme-Court-has-evolved-since-1950.html.

\textsuperscript{16} Law Commission of India Law Com 14 Reform of Judicial Administration (1958).
and a transparent process followed. By declaring such criteria, Kumaramangalam appears to have complied with the demand for transparency.

His final point — that it is open to government to select persons who meet the aforementioned criteria — is arguably correct, as a matter of law. The Indian Constitution is silent on any distinct criteria or processes to be followed in the appointment of the Chief Justice of India, as opposed to other judges of the Supreme Court. In fact, the only distinction is that in the appointment of the Chief Justice, the President is not mandated to consult the outgoing Chief Justice of India, which he must do for appointment of other judges. It is thus open to the President, who must act on the aid and advice of the government to set out criteria for the appointment and then the President must follow a fair process in appointing someone on the basis of such criteria.

However, the appropriateness of the criteria set out for appointment was belied by Kumaramangalam’s belligerence regarding Justice KS Hegde, one of the superseded judges (who he referred as ‘Mr. Hegde’, thus defying accepted tradition). His speech was primarily a diatribe against Justice Hegde’s unsuitability to be Chief Justice, particularly joining issue at his press conference where he alleged that Justice Hedge had been superseded because of orders that he (Hedge) had passed in a matter involving the election of the Prime Minister. Though Kumaramangalam strongly denied the relevance of any such judgment to the supersession, through the course of his speech, the substantive views of judges in particular cases did appear to forcefully influence him. Tellingly, in explicating his criteria of ‘suitable philosophy’ and ‘outlook’ he mentioned:

> But we do want judges who are able to understand what is happening in our country; the wind of change that is going across our country; who is able to recognise that Parliament is sovereign, that Parliament’s powers in relation to the future are sovereign powers. … Those who are able to see that, those who are able to give that importance to those areas of the Constitution which according to us are decisive for taking our country forward, such are the judges, we believe, who can effectively work and help us in the Supreme Court. This is how we look at it.17

The candour with which Kumaramangalam expressed the government’s desire to appoint judges who could ‘effectively work and help’ them meant that commentators universally saw through his stated criteria. The supersession was understood primarily as an assault on the independence of judges whose views in substantive cases did not comport with the those of government’s. It was the first step to the creation of what jurist Nani Palkhivala described as a judiciary ‘made to measure’ where judgments would be assessed on the touchstone of substantive help to the government.18 Justice Ray, according to this account, was not appointed Chief Justice on the fair application of transparent criteria; on the contrary, his judgments in favour of the government in the Bank Nationalisation, Privy Purses and Kesavananda Bharati cases had tilted the balance in his favour. As the former Attorney-General Daphtary said, ‘the boy who wrote the best essay won the prize.’19 It is worth noting that both Kumaramangalam and his critics immediately understood that what was at stake was not merely the seniority convention in the appointment of the Chief Justice of India. It was rather the much broader

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17 Lok Sabha Debates Discussion Re: Appointment of Chief Justice of India col. 377 (2 May 1973) speech of Mohan Kumaramangalam.
18 N A Palkhivala ‘A Judiciary Made to Measure’ in K Nayar (ed) Supersession of Judges (1973) 120.
question of the proper place and role of the judiciary in a democratic society. The supersession debate was essentially a stalking horse for the schism on that more fundamental issue.

Atal Bihari Vajpayee of the opposition (a future Prime Minister) framed the debate in terms of judicial independence and continuance of democracy itself. In his view, it is not as if the Constitution did not have a philosophy until Kumaramangalam delivered his speech. What was at issue was the particular philosophy that Kumaramangalam wanted judges to espouse which was less a philosophy and more a preference towards privileging directive principles of state policy (a byword for socialism) over fundamental rights (equated with individual rights over group interests). Only those with similar preferences would be considered for Chief Justiceship since this would align with the government’s own reading of the Constitution. This, in Vajpayee’s view, seriously undermined judicial independence.

Secondly, by removing seniority, no matter how flawed as a basis, and replacing it with untrammelled governmental discretion would only politicise the judiciary and appear as if political alignment alone would determine appointment. The lack of alternate criteria meant that the government was less interested in an upright, honest judiciary and more in a pliant one.20

The conflation of Kumaramangalam’s stated objectives with his personal preferences regarding judicial appointments was considered unsurprising by commentators. Given the judiciary’s expansive arrogation of powers, first by limiting any amendment of fundamental rights and then by expounding the basic structure doctrine which it would develop on a case-by-case basis, scrutiny of appointment criteria as well as governmental efforts to control the judiciary were both natural. Unfortunately, Kumaramangalam’s speech belied any attempt to distinguish the two. The supersession of judges and the dispensing of the norm of seniority were not independently done to chart out a new basis for appointment; they were done, as was declared in Parliament, in order to appoint judges suitable to the government and thereby send out a clear message to future judges. As a result, the seniority norm became intertwined with fairness and judicial independence, and any form of subjective selection particularly by the government became a byword for its antithesis. It is this binary that has shaped the future contours of the debate around judicial appointments in India.

III THE FALL AND RISE OF ‘INDEPENDENCE AS INSULATION’

A Independence in an age of deference

The supersession had two significant effects on the trajectory of judicial functioning. First, it underlined the government’s understanding that the Supreme Court was a political institution. This understanding was accentuated during the Emergency between 1975 and 1977 when fundamental rights had been suspended and political dissidence curbed. Faced with an erosion of fundamental rights, several detainees approached various High Courts for relief claiming that the right to habeas corpus could not be suspended legally during an Emergency. Though High Courts granted relief, on appeal to the Supreme Court, the judgments were reversed. In ADM Jabalpur v Shivkant Shukla,21 the Supreme Court, in a 4-1 verdict upheld the suspension of the right to move court for violations of fundamental rights and authorised detention by the

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20 Lok Sabha Debates Discussion Re: Appointment of Chief Justice of India col. 175 (3 May 1973) speech of Atal Bihari Vajpayee.
executive without trial. While a detailed analysis of the judgment cannot be gone into here, it would suffice to say that the reasoning employed by the majority judges was highly suspect.\textsuperscript{22}

The vicious cycle of politicisation was reinforced when the sole dissenting judge, Justice Khanna, was superseded and not appointed Chief Justice of India on Chief Justice Ray’s retirement. The fact that Justice Beg, who was appointed, had decided in favour of the government in the same case provided further grist to the mill that government appointments would hereinafter be partisan, determined by their assessment of how sympathetic the judge would be in bellwether cases. Not only were such sympathetic judges rewarded, but inconvenient judges were adversely impacted. Justice Khanna was passed over for Chief Justice, but equally worryingly 16 judges in various High Courts who had decided cases against the government were transferred in a mass order to other High Courts.\textsuperscript{23} Though the order was later reversed, individual judges were firmly caught in the vortex of politicisation.

Secondly, the resistance to politicisation of the judicial appointments process arose through an effort led by the Bar to insulate the judiciary legally from excessive governmental interference. Two cases exemplified this effort. In 

\textit{Union of India v Sankalchand Sheth},\textsuperscript{24} Sheth — a judge who had been transferred as part of the mass transfer order — challenged his transfer for being violative of judicial independence. Though the transfer order had been reversed and no \textit{lis} remained, the Supreme Court nonetheless answered the question given the level of public interest involved. In this case, the majority judges held that for any transfer of judges to be valid it would have to be pursuant to full and effective consultation with the Chief Justice of India. This involved placing identical facts before the Chief Justice as was before the government and a deliberative exercise. This was the first instance where the Supreme Court emphasised the role of the judiciary in protecting its own independence.

The dissenting judges however said that consent of the judge being transferred was a precondition for a valid transfer.\textsuperscript{25} This view was based on a fallacious conflation of non-consensual transfers with punitive ones. Although it was right to identify the 16 transfers made during the Emergency as punitive, the lack of consent was not what made them so. The minority’s view meant that any transfer made without the consent of the judge was, by definition, punitive. This was an over-correction that rendered the power to transfer itself nugatory.

Irrespective of the merits of the decision, the judgment reflected a renewed attempt by the judiciary to insulate itself from executive excess. It was felt that only through such insulation, fortified by constitutional interpretation, could judicial independence be protected.

The second attempt by the Bar to close ranks and protect judicial independence by insulating appointments from governmental interference was the public interest litigation, \textit{SP Gupta v Union of India},\textsuperscript{26} popularly known as \textit{The First Judges’ Case}.

SP Gupta, an advocate of the Allahabad High Court, filed a writ petition challenging the appointment of three Additional Judges of that High Court as permanent judges, as well as challenging a circular letter sent to Chief Justices and Chief Ministers in the States. The

\textsuperscript{22} For detailed analyses from figures involved in the case on both sides, see SJ Sorabjee & AP Datar \textit{Nani Palkhivala: The Courtroom Genius} (2012); TR Andhyarujina \textit{The Kesavananda Bharati Case: The Untold Story of Struggle for Supremacy by Supreme Court and Parliament} (5th Ed, 2019).


\textsuperscript{24} (1977) 4 SCC 193.

\textsuperscript{25} Ibid at paras 60 and 144, per Justice Bhagwati and Justice Untwalia respectively.

\textsuperscript{26} AIR 1982 SC 149.
letter asked the recipients to obtain the consent of Additional Judges in their respective High Courts to be permanent judges in other high courts, consonant with the Government’s policy of creating a nationally integrated judiciary by increasing out-of-state representation on High Court benches. The Court dismissed the petition and ruled in favour of the Government.

During the hearings, important questions regarding the process of initial appointments to High Courts were also raised. As a preliminary matter, the relevant sections of the Constitution of India as they stood at the time the First Judges’ Case was decided are set out below:

Art. 124(2)
Every Judge of the Supreme Court shall be appointed by the President by warrant under his hand and seal after consultation with such of the Judges of the Supreme Court and the High Courts in the States as the President may deem necessary…
In the case of appointment of a Judge other than the Chief Justice, the Chief Justice of India shall always be consulted.

Art. 217(1)
Every Judge of a High Court shall be appointed by the President by warrant under his hand and seal after consultation with the Chief Justice of India, the Governor of the State and, in the case of appointment of a Judge other than the Chief Justice, the Chief Justice of the High Court…
(Emphasis supplied)

The petitioners argued that in any dispute between the executive and the Chief Justice of India which arose during the consultative process envisaged by art 217, the opinion of the Chief Justice would have ‘primacy’ over that of the executive. The majority unequivocally rejected this view.27 According to Justice Bhagwati, the constitutional scheme did not envisage any hierarchy in the consultative process, and therefore the question of ‘primacy’ did not arise. He went on to say that art 217 clearly posited all three constitutional functionaries involved — the Chief Justice of the State High Court, the Chief Justice of India, and the State Government — as equals in the consultative process. In a rare case of conflict, the Central Government, which, in conformity with practice and convention throughout the Commonwealth was the appointing authority, was entitled to settle the dispute. Arguing that the Governor (that is, the State Government) would be in the best position to assess the ‘antecedents’ of a judicial candidate and the Chief Justice of the State High Court to assess her legal qualities, Justice Bhagwati wrote that there was a ‘valid and intelligible purpose’ for the inclusion of each of the functionaries mentioned in art 217.

Justice Desai, in his separate and concurring opinion, pointed out that to place the Chief Justice of India in this position of primacy would be to grant the Supreme Court not just judicial but administrative autonomy over the High Courts, something repugnant to the intention of the Constitution.28 The Chief Justice of India could not therefore be considered to have ‘primacy’ over either of these other functionaries.

The majority similarly rejected the view that in appointments to the Supreme Court of India, the Government was bound to follow the advice tendered to it by the Chief Justice. Justice Bhagwati noted the wide array of qualities other than legal expertise and professional competence which were relevant to the appointment of a Supreme Court Judge, including honesty, integrity, commitment to democracy, social acceptability, and sympathy with

27 Ibid at para 29, per Justice Bhagwati.
28 Ibid at para 717, per Justice Desai.
The assertion of judicial power in the Second and the Third Judges’ Case

In the Second Judges’ Case, the Supreme Court reversed its ruling in the First Judges’ Case. It read into the Constitution the primacy of the opinion of the Chief Justice of India formed collectively through a judicial collegium in appointments to the Supreme Court and High Courts. This ‘primacy’ was to have two aspects: first, the Chief Justice of India, in case of Supreme Court appointments and, in the case of appointment to High Courts, the Chief Justice of that High Court, had the right to initiate the appointments process; and second, that in case of any disagreement with the executive, the judiciary would prevail. The Third Judges’ Case reaffirmed this doctrine and detailed the process of appointment, casting in stone the unique process of judicial appointment that India follows today.

The law as it stands requires that a collegium of Judges of the Supreme Court comprising the Chief Justice of India and the four most-senior puisne Judges recommend all judicial appointments to the Supreme Court, while the collegium for appointment of High Court Judges comprises the Chief Justice of India and two next most-senior puisne judges of the

29 Ibid at para 626, per Justice Tulzapurkar.
30 Supreme Court Advocates-on-Record Association v Union of India 1993 4 SCC 441 (Second Judges’ Case).
31 Ibid at para 474.
32 Ibid at para 509, sub-para 11.
33 Ibid at para 509, sub-para 1.
Supreme Court. A similar collegium exists in the High Court comprising the High Court Chief Justice and her two most-senior puisne judges for all appointments to that High Court. No appointment can be made without the concurrence of the Chief Justice of India, and she in turn cannot recommend an appointment if two or more members of the collegium disapprove. If a candidate comes from a particular High Court, the views of the most senior Supreme Court judge who has served on that High Court are to be ascertained in writing, though she does not become a member of the collegium itself. Merit is to be the ‘predominant’ consideration, and if a senior High Court judge is passed over in favour of a more junior colleague, no special reasons for not appointing the senior judge need to be recorded. In fact, not only are reasons for appointing (or not appointing) a person, not provided, the entire process of the recommendation of a candidate by the judicial collegium operates seemingly informally, without criteria or publicly available records.

We will now examine the constitutional soundness and internal coherence of this machinery in order to shed light on the Indian judiciary’s approach to judicial independence. We will then critically analyse the Fourth Judges’ Case, which struck down the Constitution (99th Amendment) Act 2015 creating the National Judicial Appointments Commission thereby restoring the collegium system.

In the Second Judges’ Case, Justice Verma writing for the majority asserted that arts 124 and 217 had to be interpreted in a manner which gave effect to the ‘constitutional purpose’ of ‘[ensuring] the independence of the judiciary.’ According to the majority, the primacy of the judiciary in judicial appointments was the only way of ensuring that this constitutional purpose was met. This was justified by a historical reading of the provision, the legislative intent of curbing executive excess, and an intrinsic faith that the judicial fraternity would be best placed to maintain its own independence. We take up in turn the two legs on which the majority’s arguments rest — the historical-purposive argument and the functional-institutional argument.

1 The historical-purposive argument

The Court related the constitutional history of India, pointing out that under the Government of India Acts of 1919 and 1935, Judges of the High Courts in the Provinces and (after 1935) of the Federal Court were appointed by His Majesty (in practice, acting through the colonial executive) without any limitation. According to the Second Judges’ Case, the overriding concern of the Constituent Assembly after independence was to do away with this unfettered executive power to appoint judges.
Concerns were indeed voiced during the Constituent Assembly’s deliberations about an overweening executive impinging on judicial independence. In fact, Dr BR Ambedkar, Chairman of the Drafting Committee of the Constitution, said in the course of debate that ‘it would be dangerous to leave the appointments to be made by the President, without any kind of reservation or limitation, that is to say, merely on the advice of the executive of the day.’ This was a view which found wide support in the assembly.

While this demonstrates that the framers were indeed concerned about the possibility of unfettered executive power in relation to judicial appointments, there is no indication that they ever seriously contemplated a proposal to materially exclude the executive from the process altogether. In fact, one of the few concrete proposals against which Dr Ambedkar warned during the debates was ‘[allowing] the Chief Justice practically a veto upon the appointment of judges.’ An amendment to specifically require the concurrence of the Chief Justice of India in judicial appointments was rejected. It is clear from the debates that the framers were arguing against any organ being vested the unfettered power to appoint; instead they recommended a system of checks and balances carefully avoiding the language of primacy. To suggest that they would have countenanced a complete reversal in the hierarchy, with the judiciary providing the initiative and the final say in appointments, is a plainly incorrect reading of the Constituent Assembly debates.

The Court in the Second Judges’ Case evidently did not take due cognisance of this aspect of drafting history while purposively interpreting arts 124 and 217. Further, it is a well-established principle of common law that the first port of call for the judiciary in interpreting a provision of law must be the ordinary meaning of the words used by the draftsman. Purposive interpretation, even if employed, is an exceptional approach, to be used only when: ‘application of literal construction of the words in the Statute leads to absurdity, inconsistency or when it is shown that the legal context in which the words are used or by reading the Statute as a whole, it requires a different meaning.’

The Court in the Second Judges’ Case failed to prove that it would lead to any kind of ‘absurdity’ to adopt the plain meaning — or at least a plain meaning — of ‘consultation’. After all, ‘consultation’ even within its ordinary meaning can take on a wide range of meanings. A ‘thick’ substantive view of the word ‘consultation’ had already been articulated by the Court in Sankalchand Sheth: consultation had to be ‘full and effective’ which implies that it must be based on full and identical facts which must constitute the basis of the decision; and in Justice Subba Rao’s dictum, that the word ‘consult’ implied a ‘conference of two or more persons … to enable them to evolve a correct, or at least a satisfactory solution.’

The Court chose not to revive and enrich this line of jurisprudence. Taking a rather blunter approach, it simply read the word ‘consultation’ to effectively imply ‘concurrence’, so that no appointment decision could be taken without the judicial collegium having the last word. This was neither an appropriate use of purposive interpretation nor true to the legislative intent behind the use of the term in the first place.

46 Ibid.
47 Ibid.
49 Ibid.
50 Sankalchand Sheth (note 24 above) at para 39, per Justice Chandrachud.
51 Pushpam v State of Tamil Nadu AIR 1953 Mad 392.
2 The functional-institutional argument

In a related contention, the majority in the Second Judges Case advanced a justification from institutional competence to support its interpretation of the Constitution. Justice Verma argued: ‘It is obvious that the provision for consultation … was introduced because the Chief Justice is best equipped to know and assess the worth of the candidate’. \(^{52}\) According to the Court, the ‘worth of the candidate’ is to be assessed based on ‘[l]egal expertise, ability to handle cases, proper personal conduct and ethical behaviour, firmness and fearlessness’. \(^{53}\)

In the Third Judges Case, the Supreme Court clarified that ‘proper personal conduct’, was a quality which the executive might be well-placed to assess, but that ‘legal expertise’, the primary quality, was the exclusive preserve of the Supreme Court. The Supreme Court made this statement almost axiomatically and does not advance much evidence for it.

There is no obvious reason why the executive would not also be qualified to assess a potential Judge’s worth on these grounds. The Union Law Ministry is, by convention, usually headed by someone with some legal experience or training and staffed by a permanent secretariat of civil servants. It also has the counsel of the Attorney General, Solicitor General, and Additional Solicitors General — an advantage not available to the collegium. There is no reason to believe that all these officers together would not be competent to reach at least tentative conclusions on the legal expertise of a candidate for an office in the higher judiciary. Indeed, it has been pointed out\(^{54}\) that many of independent India’s greatest and most fiercely independent jurists were selected before the collegium system was ordained by the Supreme Court in 1993.

Further, even if the executive is best placed to provide its views on ‘personal conduct’ of judges presumably using its vast law enforcement machinery to perform relevant background checks, there is no argument as to why such determination would be secondary to a determination of legal ability of judges. A judge must possess a range of virtues including knowledge of law, analytical ability, and personal integrity. To suggest that the judiciary, which is purportedly best placed to assess legal ability, should enjoy primacy, even if correct, assumes a hierarchical superiority of the need for legal ability over other factors. This is, without further argument, unjustified.

The Court repeatedly stressed that what it was aiming to achieve was in fact a ‘participatory constitutional function’, \(^{55}\) saying that the selection of judges must be a ‘joint venture’ \(^{56}\) wherein a role is provided to both the judiciary and the executive in an ‘integrated process of appointment’. \(^{57}\) This repetition was, however, a rather half-hearted attempt to stitch a fig-leaf to protect judicial primacy. This is because the Court also said that it aimed to reduce the role of the executive to the ‘minimum extent possible’. \(^{58}\) It is a rather strange participatory exercise which begins by telling the other participant that she is to have the minimum possible role in it.

Furthermore, if the judicial collegium initiates new appointments, has the right to issue binding recommendations and is the only forum where recommendations are debated, it

\(^{52}\) Second Judges’ Case (note 30 above) at para 40.

\(^{53}\) Ibid at para 52.


\(^{55}\) Second Judges’ Case (note 30 above) at para 16.

\(^{56}\) Ibid at para 28.

\(^{57}\) Ibid at paras 51, 293.

\(^{58}\) Ibid at para 14.
is unclear exactly where the executive substantively ‘participates’ in a ‘joint venture’. The recognised form of executive inputs in this process is the furnishing of Intelligence Bureau (IB) reports on the background of potential candidates by the Ministry of Law and Justice to the collegium.59 This part of the process is, unsurprisingly, shrouded in secrecy. It would not be unfair to say that the executive has often used this as a lever to exert influence over certain appointments. Alleged ‘red flags’ in IB reports60 and long delays in conveying its views to the collegium61 have become ways for the executive to indicate its displeasure at a particular candidate.

Few would suggest that the present form of executive intervention in the appointments process is conducive to an optimal appointments process. It is worth noting, however, that it is the unique collegium system which has given rise to this form of intervention. Since the executive has been shut out of the ‘formal’ appointments process, it finds more oblique routes to convey its views which are likely more corrosive to accountability than transparent involvement would be. Despite this recognised role for the executive, it remains entirely up to the collegium to decide what action, if any, to take on any report furnished by the Law Ministry. There is no formal, recorded discussion or consultation between the two organs of state; the executive’s role appears to be a subordinate rather than a participatory function.

The Court’s approach is rather reminiscent of Henry Ford’s famous *bon mot*, ‘You can have any colour you like, as long as it’s black’. One would hardly consider this an expression of genuine participation and choice.

Ultimately, both strands of reasoning of the majority judges in the Second Judges’ case were based on the implicit belief that judges themselves would be best placed to appoint their future colleagues in a manner that preserved judicial independence. Though this cannot be validated in this article, there is enough evidence elsewhere to suggest from three decades of experience that Justice Verma’s future colleagues belied his fond hope in this regard.62 Equally, another consequence of judicial appointments being led by the judicial collegium has been a characterisation of the process as a turf war between government and the judiciary. This was demonstrated most overtly in the hearings and judgment in the Fourth Judges’ Case and the constant friction between the government and the judiciary thereafter.

C The stillborn National Judicial Appointments Commission

After two decades of relatively quiet submission to the collegium system, Parliament and Government decided to act. In 2014 they enacted legislation to create a National Judicial Appointments Commission (NJAC). This was not a partisan issue, and both Houses of Parliament as well as the requisite half of all State legislatures63 approved the proposed amendment, which became the 99th Amendment to the Constitution together with the

60 Former Supreme Court Judge, Justice Lokur of the Supreme Court highlighted concerns about the use of the Intelligence Bureau as a conduit of government influence in the judicial appointments process; see Madan B Lokur ‘Govt Calling the SC Shots?’ *Indian Express* (16 September 2019), available at https://indianexpress.com/article/opinion/columns/govt-calling-the-supreme-court-shots-narendra-modi-6070659/
63 As required by art 368(2) of the Constitution of India.
National Judicial Appointments Commission Act. This Amendment altered the foundation of arts 124 and 217 which had been interpreted by the Supreme Court to create a judicial collegium. It proposed that all appointments to the higher judiciary were to be made by the President on the recommendation of a National Judicial Appointments Commission (NJAC), comprising six members:
1. The Chief Justice of India (as Chairman)
2. The two most senior puisne Judges of the Supreme Court
3. The Minister for Law and Justice
4. Two eminent persons nominated by a committee comprising the Chief Justice of India, the Prime Minister, and the Leader of the Opposition in the Lower House of Parliament.

Decisions of the NJAC were to be by a special majority: any two negative votes could block a candidate. Parliament in passing this amendment had sought to break free of the strictures of interpretation imposed by the Court by amending the Constitution itself. However, the amendment itself was challenged for violating the basic structure of the Constitution.

The key issue was whether Parliament had the power to amend the Constitution to give effect to such a system of judicial appointments. It is settled law in India that Parliament does not have the power to destroy the basic structure of the Constitution through the amendment process in art 368.64 Equally, it is the law that the independence of the judiciary is part of this basic structure. What was at issue in this case was whether judicial primacy in appointments as established by the Second Judges’ Case was necessary to protect this part of the basic structure, and consequently whether the NJAC was destructive of it.

Given this question before the Court, it was surprising that the majority judgment spilt much ink reiterating and defending the interpretation of the Constitution in the Second Judges’ Case. After all, the Constitution had been amended. The Judges were no longer dealing with the same text, and the question was not of interpretation but of whether the amendment conformed with the basic structure of the Constitution. Despite this seemingly unnecessary digression, the majority, on the merits of the question before them, struck down the constitutional amendment in its entirety. This was the first time that the Supreme Court had ever done so.65

According to Justice Khehar, the NJAC was destructive of the basic structure for two main reasons: first, it did not ensure adequate judicial representation in selection, such that even if the Chief Justice and two most senior puisne judges agreed on an appointment, it may not be made;66 and second, that the presence of the Law Minister created a conflict of interest and violated judicial independence because the Government of India was party to much litigation in the Courts.67 Additionally, Justice Khehar argued that the ‘eminent persons’ clause was void for vagueness for not prescribing any minimum qualifications for such persons.68

None of these arguments provide a convincing basis on which to have struck down the 99th Amendment. Justice Khehar (joined in part by Justice Goel) appeared to use ‘judicial primacy’ and ‘judicial independence’ almost interchangeably. There is no substantive reasoning provided why judicial primacy is a necessary requirement for judicial independence to be preserved. Presumably, in their defence, the digression into defending the interpretive exercise

65 The Supreme Court had earlier struck down certain parts of the 25th, 32nd, 39th, 42nd, and 52nd Amendments, all of which were ouster clauses excluding the jurisdiction of the Courts from various executive and legislative actions.
66 Fourth Judges’ Case (note 40 above) at para 227.
67 Ibid at para 287.
68 Ibid at para 301.
in the *Second Judges’ Case* was meant to serve this purpose. But this makes a category mistake — the *Second Judges’ Case* could plausibly (though in our view, wrongly) interpret the word ‘consultation’ as requiring ‘judicial primacy’. This would be a purposive interpretation of the provision, as it then stood. It is an entirely different matter to state that such primacy is necessary in any system of appointment, irrespective of what the text says, as the majority judges in the NJAC case did. Unfortunately, the judges appeared to have assumed this rather than explained it.

Consequently, as Justice Chelameswar pointed out in his dissenting opinion, they failed to distinguish between an amendment which merely affected one single basic feature of the Constitution and one which destroyed the basic structure as a whole. Once they concluded that primacy in judicial appointments had been affected, since a unanimous vote of the three judicial members of the NJAC was not sufficient to make an appointment, it was considered *ipso facto* that the appointment had destroyed the basic structure. This was an unfortunate lack of reasoning. While the details of the basic structure doctrine cannot be gone into here, it would suffice to say that the power to strike down a constitutional amendment, the highest expression of parliamentary sovereignty, should ordinarily be exercised more cautiously.

The second point, regarding the Law Minister, was curious. The executive has a role in appointments to the judiciary in many countries: the United Kingdom, the United States, South Africa, Australia, Canada etc. and before 1993, in India. It would be strange to say, surely, that any of these jurisdictions could be described as one where judicial independence had been ‘destroyed.’ As Sengupta points out, the question of unacceptable executive interference in judicial appointments arises (at best) only when the executive has a determinative role in the selection of Judges. The Law Minister, as one of six members and with no power of veto, clearly had no such determinative power.

Finally, to strike down a constitutional provision as void for vagueness was a novel development in this case. The process of selection for eminent persons through a high-powered committee was provided in the amendment. The reason no ‘objective’ criteria — such as years of legal practice, for instance — were prescribed was to allow these eminent persons to be selected from outside the legal fraternity and to ‘prevent the judiciary from being, or becoming, a self-perpetuating old boys’ club.’ For instance, leading members of civil society might be selected in order to give non-governmental stakeholders a say in the appointment of high constitutional functionaries. This lack of criteria was found by the majority to be vague and therefore unconstitutional. To use a principle of administrative law to test delegated legislation in the context of a constitutional provision that vested powers in the Chief Justice, Prime Minister and the Leader of the Opposition in the Lower House of Parliament is, at the very least, a surprising interpretive move.

In his forceful dissent, Justice Chelameswar made a case for judicial restraint. Confining himself largely to the main issue, that is, the power of Parliament to pass the impugned Amendment, Justice Chelameswar drew a distinction between ‘basic features’ of the Constitution and the ‘basic structure’ of the Constitution. In his view, it is entirely possible

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69 Ibid at para 492.
71 Sengupta (note 23 above) 47.
72 Ibid 49.
73 *Fourth Judges’ Case* (note 40 above) at para 492.
for a ‘basic feature’ of the Constitution to be amended without destroying the basic structure of the constitutional scheme as a whole.\textsuperscript{74} For illumination, let us take Sengupta’s example.\textsuperscript{75} The process of impeachment of Judges must currently be initiated by a petition signed by 50 Members of either House of Parliament. If this was to be lowered to, say, 20, the Court may well inquire into whether the independence of the judiciary as a basic feature has been ‘affected’, but it would be difficult to conclude that this change alone — given the numerous further hurdles to impeachment — would constitute a ‘destruction’ of the basic structure as a whole.

The \textit{Fourth Judges’ Case} is not without defenders. Datar echoed Justice Khehar’s critique of the 99th Amendment and pursuant legislation, arguing that they were badly drafted and vague.\textsuperscript{76} Others like Gopal Subramaniam laid heavy emphasis on the darkest period of India’s independent history beginning with the supersession in the 1970s, when the judiciary was subservient when confronted with a dominant executive.\textsuperscript{77} The question before the Judges however, was not one of a return to that era. Rather, it was about whether a democratically elected legislature can prescribe, by a constitutional amendment, a means of choosing judges which, while giving due deference to the judiciary, included stakeholders from outside it. As a question of law, this had a straightforward constitutional answer — yes. However, by digging its heels in, the Court underlined that judicial appointments were less a question of constitutional law, and more a matter of constitutional politics. As a political matter, the Supreme Court’s foremost goal was to reassert the equation of judicial independence with judicial primacy, by circumscribing the role of the government and fortifying its own role.

Seen in this way, the reasoning of the majority in the \textit{Fourth Judges’ Case} appears to be a clear continuation of a line of thought that emphasised the importance of insulating the judiciary from the government. This ghost of supersession was casting its long shadows four decades hence leading to a constitutional over-correction that, while ostensibly designed to secure judicial independence in appointments, has ended up preserving judicial dominance and preventing a working checks-and-balances scheme. The system of judicial appointments as it operates today is denuded of public confidence, opaque, leads to questionable choices and entirely without criteria.\textsuperscript{78} This suggests that there is a need to come out of the shadows of the supersession and distil some lessons on what an appointments mechanism should (and should not) look like today.

\textsuperscript{74} Ibid at para 492–502.
\textsuperscript{75} Sengupta (note 23 above).
\textsuperscript{76} Arvind Datar ‘Eight Fatal Flaws: The Failings of the National Judicial Appointments Commission’ in Sengupta & Sharma (note 4 above) 122.
\textsuperscript{77} G Subramaniam ‘The NJAC Case and Judicial Independence: Conceptual and Contextual Safeguards’ in Sengupta & Sharma (note 4 above) 168.
III LESSONS FROM THE INDIAN EXPERIENCE: FOUR DESIGN PRINCIPLES FOR APPOINTING JUDGES TO CONSTITUTIONAL COURTS

The Indian experience of judicial appointments is a cautionary tale. It is a lesson for lawyers, judges and policy-makers in India that designing a system of appointments is a complex exercise involving a range of factors, both legal and political. Equally, it cautions other jurisdictions, which might have their own controversies surrounding judicial appointments, that there is no single ‘right’ way to appoint judges to constitutional courts. Designing a workable appointments mechanism must be cognisant of the country’s constitutional history, its political climate, particularly the powers wielded by the judiciary vis-à-vis other organs of government and the popular sentiment of the citizenry towards those organs.

Unsurprisingly, devising an appointments system that captures these realities is a difficult exercise. In India, several experiments have been implemented and several others mooted with varying degrees of success. The purpose of this part is not to prescribe yet another method. Instead, what would be more useful for constitutional lawyers in India and elsewhere is to distil a few key design principles of an appointments system.

To this end, we identify four key principles which ought to be observed: proportionality between the power wielded by the judiciary and the level of democratic scrutiny of judicial appointments; breaking the closed loop by which judges are primarily accountable to themselves and their colleagues; greater faith in the branches of government directly accountable to the electorate in an appointments mechanism; and an optimal level of transparency in appointments to prevent a mechanism as shrouded in secrecy as the collegium in India from taking root.

While understandably these principles will have to be suitably adapted to apply in different jurisdictions, the Indian experience commends these principles as essential facets of any legitimate and well-functioning appointments mechanism. These principles are not exhaustive, nor are they a guarantee of a functioning appointments system; on the contrary, this discussion is meant to serve as a foundation allowing lawyers in various jurisdictions to introspect on their own mechanisms and the shape possible reforms might take.

A Appointment methods must be proportionate to the exercise of judicial power

The Indian experience is testament to the salient fact that methods of appointment of judges must correspond to the extent of substantive powers of judicial review exercised by the judiciary. That is why the same executive-led form of appointment which had carried on without significant demur from any stakeholder in the first two decades of independence became entirely unsuitable in the next five years. A series of decisions beginning with *Golak Nath* made the Supreme Court an active player in the constitutional governance of the country. While it had ruled on significant issues in the first decade and a half, its consistent anti-majoritarian rulings upturning two decades of precedent gave it a public profile it had hitherto not had.

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Combined with political ambitions of some of its judges,80 the Court took on a larger-than-life image in the minds of the citizenry and the government.

In these circumstances, combined with a powerful majority government with a social reform agenda, having an appointments mechanism that was based on convention and practice was always going to be under challenge. As evident from the speeches in Parliament discussed in part II, the perceived activism of the judiciary was a key factor in the first supersession of three judges in 1973 and subsequent governmental efforts to use the existing powers of appointment to meddle with judicial composition.

In these episodes lies a salient lesson — the nature of the appointments process is intrinsically linked to the extent of judicial review powers and consequent public profile enjoyed by the judiciary. The wider the powers of the appointments process and the more public its role, the greater are going to be the demands by stakeholders to share the powers of appointment. Not only did that manifest in the supersession with the executive attempting to wrangle complete control, but also with the introduction of the NJAC, where the executive was attempting to claw back some of its powers of appointment in the face of an extremely powerful Supreme Court which had expanded its writ jurisdiction tremendously.81

The underlying problem here is the loosening of the ‘web of integrated government.’82 The web of integrated government is woven by the carefully established checks and balances scheme by which various organs of government optimally collaborate and conflict with each other to ensure governance. Collaboration is necessary to further governmental objectives; in the same breath, circumscribed conflict is essential to ensure that each organ stays true to its task and has enough fortification to resist over-reach by others and little incentive to over-reach itself. In Madison’s words ‘ambition [must] counteract ambition.’83

In India, this web has loosened with the progressive insulation of the judiciary from its coordinate organs in its composition and the concomitant arrogation of wide powers of judicial review. While the latter is substantially beyond the scope of this article, it is widely acknowledged that the Supreme Court of India is one of the most powerful constitutional courts in the world.84 It governs forest management,85 the administration of cricket,86 the location of liquor vends87 and a range of governance functions whose links to questions of constitutional law are tenuous at best. The insulation of the judiciary from the influence of the executive, concurrent with the expansion of judicial power into domains traditionally regulated by the executive, causes a constitutional dissonance which undermines the web of integrated government.

If, however, traditionally ‘executive’ domains are to continue to be increasingly judicialised, the maintenance of the web of integrated government requires the approximation and transposition of more robust methods of executive accountability to the judicial branch. In

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80 Justice K Subba Rao was the candidate of the united Opposition in the elections to the Presidency in 1967; Justice KS Hegde had served as an MP in the Rajya Sabha for ten years, and was known to make provocative statements from the bench.
81 A Bhuwania Courting the People: Public Interest Litigation in Post-Emergency India (2017).
82 Sengupta (note 23 above) 237.
86 Board for the Control of Cricket in India v Cricket Association of Bihar (2015) 3 SCC 251.
87 State of Tamil Nadu v K Balu (2017) 2 SCC 281.
other words, we must take a ‘functional’ rather than a purely ‘institutional’ view: the question is not simply whether a particular method of appointment is appropriate to the judicial branch, but whether it is appropriate given what that branch does. It may well be that increased judicial power over macro-political matters is inevitable, but neither mode of appointment with which India has had experience — first executive and then judicial primacy — is appropriate to that end. Public administration necessarily involves weighing competing interests and arriving at equitable solutions. These compromises are considered legitimate due to the democratic nature of the decision-making body. If the judiciary is to continue to engage in such exercises at scale, it must be subject to the concomitant levels and forms of accountability to maintain the web of integrated government.

B No judiciary, however well-intentioned, can be solely trusted

According to Justice Verma, judicial primacy in appointments was acceptable because the judges would always be accountable to the ‘ever-vigilant Bar.’\textsuperscript{88} No other accountability was considered either necessary or desirable. As Lord Cooke has pointed out, however, it is unrealistic to imagine that the Chief Justice and senior Judges of the Supreme Court would be held accountable by junior members of the Bar, who would presumably hope to appear before the same Judges in Court.\textsuperscript{89}

Whether the Bar is a representative, diverse, or independent enough institution to hold the judiciary accountable may be queried. But even setting aside these questions, this represents a narrow view of accountability in the context of judicial appointments. It assumes that legal proficiency is the main factor to be considered in appointing a judge. While this is of course a necessary condition, it is not sufficient. A different skill set is required to assess other qualities such as the Judge’s personal integrity, character, and antecedents.\textsuperscript{90} As discussed earlier, the executive branch possesses a vast law enforcement machinery to make this determination, and there is no apparent reason that determinations on such matters ought to be secondary in importance to the collegium’s and subject to its approval. It, of course, assumes that such determinations will be made fairly and professionally, which is often not the case.\textsuperscript{91}

Indeed, certain trends do not inspire great confidence in the ability of the current mode of selection to weigh these various factors in the balance. The Law Commission of India has highlighted the phenomenon of ‘uncle judges,’\textsuperscript{92} whereby advocates practising in a particular high court are related by familial and social ties to high court judges in the same jurisdiction. This undermines the perception of judicial impartiality, as these persons have long-standing relationships with many of those who appear before them.

For instance, in 2010, the Chief Justice of the Punjab and Haryana High Court forwarded to the Union Law Ministry a list of serving ‘uncle-judges’ on that Court’s bench, revealing

\textsuperscript{88} Second Judges’ Case (note 30 above) at para 44.

\textsuperscript{89} Lord Cooke of Thorndon Collected Papers of Lord Cooke 6 VUWLRP 27/2017.

\textsuperscript{90} First Judges’ Case (note 26 above) at para 29 (acknowledged by Justice Bhagwati).

\textsuperscript{91} In the course of proceedings in the Third Judges’ Case (note 34 above), Justice BN Kirpal recounted how the Intelligence Bureau had labeled a prospective candidate for judgeship an alcoholic because of his nickname, ‘boozer’. It was in fact well-known in the legal fraternity that this sobriquet was sardonic, given to him because he was a teetotaler; see Sumit Mitra ‘Supreme Court Bench Makes CJI One among Other Judges in Appointing Colleagues’ \textit{India Today} (9 April 1998), available at https://www.indiatoday.in/magazine/nation/story/19981109-supreme-court-bench-makes-cji-one-among-other-judges-in-appointing-colleagues-827734-1998-11-09

that 34 per cent — 16 out of 47 — of the serving Justices were related to advocates practising in the same Court. Earlier, in 2003, the Bar Council of India had reported to the Ministry that just over a quarter of all sitting High Court Judges in India had relations appearing in that same High Court.

Nepotism is not a social ill unique to the judiciary or, for that matter, to India. A wide-ranging survey of varied institutions might reveal that these numbers are in line with broader social trends, but this is not within the scope of this article. Legitimacy, however, is at least as much about perception as about reality. The self-appointing nature of the judiciary, operating in a nearly-closed loop, raises questions about the motives behind such appointments as there are no external checks on them. In this way, judicial self-regulation is a poison-pill, which, though it shields the judiciary from accountability, also undermines its legitimacy in the eyes of those it seeks to serve.

C No political executive, however vile, must be demonised

The assumption behind judicial self-regulation is, of course, due to mistrust in the political process. This attitude is clear in the Second Judges’ Case, in which Justice Verma discounts any possibility of political oversight of judicial appointments:

Accountability of the executive to the people in the matter of appointments of superior judges has been assumed, and it does not have any real basis…
There is no occasion to discuss the merits of any individual appointment in the legislature on account of the restriction imposed by [the Constitution]…
Experience has shown that it also does not form part of the manifesto of any political party

While it is true there are restrictions on discussing the behaviour of judges in Parliament, this has not precluded debates on judicial independence and the behaviour of the Government in appointing judges. The most heated of these debates, over the behaviour of the government in superseding judges in 1973, is discussed in the first part of this article and surely counts among the most robust and informed exchanges in the history of India’s parliamentary democracy.

Furthermore, Justice Verma was mistaken in saying that judicial appointments have never formed part of party manifestos. As Prof RK Tiwari’s systematic analysis of party manifestos in India notes: ‘Judicial Reforms have always been an important component in the party manifestos.’ Specifically, of the parties represented in Parliament, the Socialist Party in its 1957 manifesto, the Communist Party of India (Marxist) in its 1971 manifesto, and the Bharatiya Janata Party in its 2014 manifesto, all advocated for changes to the process of judicial appointments.

Ultimately, the political executive must be held politically accountable for its actions in every sphere of its activity. This is not just for reasons of political morality, but rather hard practicality: there are simply more avenues to hold it accountable. Every five years at the most, the executive must answer to the people for the sum total of its behaviour. As shown above, it is far from true that the people and opposition parties do not care about judicial politics. It arguably decided the Indian General Election of 1977 when Indira Gandhi was voted out

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94 V Venkatesan “‘Uncles’ on the Bench’ (14 January 2011) 28 Frontline, available at https://frontline.thehindu.com/other/article30174072.ece
Demonising the executive, and further, trying to restrict its powers, in judicial appointment (or, for that matter in substantive matters of governance) can scarcely provide a sustainably workable solution.

D Optimal transparency is critical

In order not to replicate the flaws of the secretive collegium, some level of transparency must be built into the process. In this aspect, the ideal method of appointment must steer a middle course between the smoke-filled rooms of the collegium, and the overtly political showmanship that sometimes comes with too much publicity.

Transparency has both an instrumental and an inherent value. In instrumental terms, it ensures that there have been no extraneous factors animating the process of appointments and allows the public to be informed about the workings of an institution which has a great impact upon the national life. Institutions of government in a democracy must be maintained on the public trust, and this trust cannot be blind. The people must see that their institutions are functioning in a way which best serves the public weal. The judiciary is no exception to this rule in its administrative function as it is in its judicial avatar. This is the inherent need for transparency.

An overly public-facing process, however, has its own pitfalls. The process of confirming judges to the Supreme Court of the United States has provided numerous instances of this danger. The confirmation hearings of Judges Bork in 1986 and Kavanaugh in 2018, whatever the substantive merits, saw intensely heated partisan exchanges which few would argue behoved the dignity of the high office under consideration. Partisan politics are, of course, unavoidable given the process of judicial appointments chosen by the United States of confirmation by the Senate. The intention is not to criticise this entire process — there may well be merits, given the political fallout of judicial decisions, for the elected legislature to have a say in judicial selection — but to point out that there are certainly pitfalls associated with ‘too much’ transparency.

As the South African experience has also shown, transparency is no guarantee of an edifying process of appointment; in one instance, according to the legal commentator Carmel Rickard, a female candidate normally residing abroad was asked in an open JSC hearing whether, even if she were not appointed, she might consider moving back to South Africa ‘if she got a boyfriend there.’ That a difficult balance must be struck was highlighted by the three distinct approaches taken to the transparency of JSC deliberations by Madlanga J (for the majority), Jafta J, and Kollapen AJ in the case of Helen Suzman Foundation v Judicial Service Commission.

Given these considerations, the two guiding principles in designing an optimally transparent judicial appointment process ought to be (i) maintaining the dignity of the office to which

98 C Rickard ‘Judging Women Harshly’ Sunday Times (23 October 2005)
99 Helen Suzman Foundation v Judicial Service Commission [2018] ZACC 8; 2018 (4) SA 1 (CC); 2018 (7) BCLR 763 (CC). The majority concluded that JSC deliberations, save only for confidential information, ought to form a part of the public record, analogising JSC proceedings to fair and open trials. Jafta J, on the other hand, made a compelling case against such an analogy and noted the possible effect of publicity on the candour of JSC deliberations, while Kollapen AJ argued for a test of relevance before including deliberations in the record.
appointment is sought while (ii) ensuring that the process is not so opaque as to call into question the substantive reasons for the outcomes of the process.

The pitfalls of opacity are, of course, clear. A process which is totally shielded from public view is one which is susceptible to sub-optimal practices. Many of the vices of opacity are reflected in the functioning of the collegium system in India. The increasing judicialisation of administration and politics demands, as we have discussed above, some level of democratic legitimacy in judicial appointments. A process which is obscured from the public is unlikely to yield such legitimacy.

Though a more abstract idea, the dignity of the courts must also be borne in mind and balanced against this need for transparency. The law court is an institution elevated above those who come to it seeking justice. It is an institution where ‘not only must justice be done; it must be seen to be done.’100 Although empirical research to confirm this is difficult to conduct, few would dispute that the ‘majesty of the law’ as manifested through many symbols — including but not limited to the elevated bench, black robes, and judicial honorifics — is a factor in the popular legitimacy of the judiciary. This majesty, which reinforces the notion in the minds of litigants that the judge will be an impartial arbiter of the dispute before her, would be undermined if the judicial selection process involved a forensic public examination of a candidate’s past. For example, a prospective candidate may have been involved in student activism, represented a controversial client, or even held political office. Her role as a judge would, of course, depend on setting aside previous biases, and the public has a right to be aware of the salient facts. An overly transparent process, however, may unduly politicise such an examination and could well be used by vested interests to cast a shadow over the legitimacy of a disfavoured candidate. In this, as in other similar matters, an optimal degree of transparency is desirable ensuring that the public retains confidence in the process.

IV CONCLUSION

In this article, we have given an overview of the process of judicial appointments in independent India, and a critique of the law that is responsible for the process as it currently stands. It ought to be noted that this history has proceeded in an almost dialectical manner, with executive overreach begetting judicial dominance. In this movement from pillar to post, a commensurate swing in the other direction, at the present moment, would not bode well for the judicial branch and consequently for the constitutional system as a whole. Rather, keeping the political organs within a circumscribed role in the appointments process may be distinctly preferable to casting them aside thereby allowing them to derail a process where they have little skin in the game. With this in mind, we have provided a few design principles for devising a model appointments method. We hope that these principles provide guideposts to any jurisdiction, particularly in the global South, that is looking at reforming its method of appointment of judges to its constitutional courts.

100 R v Sussex Justices, ex parte McCarthy [1924] 1 KB 256.
Access to Effective Refugee Protection in South Africa: Legislative Commitment, Policy Realities, Judicial Rectifications?

RUVI ZIEGLER

ABSTRACT: Just over two decades ago, South Africa (SA) adopted the Refugees Act 130 of 1998 (RA), which incorporated the Republic’s global and regional international refugee law (IRL) obligations. For its time, the RA was progressive and advanced in terms of the scope and content of protection it provided for refugees. The coming into force on 1 January 2020 of the Refugees Amendment Act 11 of 2017 (RAA 2017) substantively and detrimentally altered SA’s refugee protection landscape by severely restricting access to the asylum regime and by denying asylum-seekers substantive rights that were previously available to them. The amended RAA 2017 also withdrew status and protection from refugees, recognised as such under IRL. Indeed, many new provisions now arguably violate both SA’s international obligations and its Constitution.

Two decades after the coming into effect of the RA, this article critically appraises access to effective refugee protection in SA through an international refugee law lens. It argues that SA courts were forced to straddle between the legislative promise of the RA and Executive policies designed to limit access to asylum procedures and to deny asylum-seekers substantive rights. Courts have extended constitutional protection to those physically in the Republic, irrespective of their legal status in SA. They have utilised the principle of nonrefoulement, enumerated in s 2 of the RA, to bridge a protection gap between ‘asylum-seeker’ (per the RA) and ‘illegal foreigner’ (per the Immigration Act 13 of 2002), ensuring access to the asylum process by requiring the issuance or renewal of asylum permits. Courts have also utilised the constitutional right to dignity to facilitate asylum-seekers’ (partial) access to substantive rights to employment, to basic medical care, to education, and to marry South Africans, which the Executive (through directives, regulations, and other policies) sought to deny them. Yet, generally, in their asylum jurisprudence, SA courts have not utilised IRL, let alone as the primary interpretive source, and they have refrained from pronouncing on policies’ incompatibility with the Republic’s international obligations in the light of the declaratory nature of refugee status.

The adverse effects of the RAA 2017 render inevitable its constitutional review. This article argues that, ‘armed’ with the much-strengthened interpretive role of IRL & International Human Rights Law (as mandated by the Refugees Amendment Act 33 of 2008), SA courts must be prepared to declare certain RAA 2017 provisions (and their accompanying Regulations) as unconstitutional.
KEYWORDS: 1951 Convention, Bill of Rights, detention, employment, International Refugee Law, nonrefoulement, Refugees Act, Refugees Amendment Act 2017, political activities

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I  CONTEXT: THE SOUTH AFRICAN ASYLUM REGIME AND THE CONSTITUTIONAL ROLE OF INTERNATIONAL LAW

A  Introduction

Just over two decades ago, South Africa (SA) adopted the Refugees Act 130 of 1998 (RA), which incorporated the Republic’s global and regional obligations under international refugee law (IRL). In terms of the scope and content of protection it provided for refugees, the RA was progressive and advanced. The coming into force on 1 January 2020 of the Refugees Amendment Act 11 of 2017 (RAA 2017) substantively and detrimentally altered South Africa’s refugee protection landscape, severely restricting access to the asylum regime and denying asylum-seekers substantive rights that had previously been available to them. Moreover, the amended RA withdraws status and protection from some refugees, recognised as such under IRL. Indeed, many of the new provisions arguably violate SA’s international obligations and its Constitution.

This article appraises over two decades of South African asylum jurisprudence. Its analysis reveals significant gaps between the Republic’s IRL commitments as expressed in the Preamble and substantive provisions of the RA and its policy realities for asylum-seekers — ultimately cemented by the enactment of the RAA 2017. Part I of this paper sheds light on the promise of refugee protection prior to the RAA 2017, juxtaposing it against actions of the South African Executive which have undermined and still do undermine access to asylum. Highlighting the prominent role of international law in SA’s constitutional framework, the article probes the insubstantial part that IRL has played in asylum adjudication until now. Part II appraises the courts’ endeavours to bridge protection gaps which the Executive’s policies have (often deliberately) created regarding asylum-seekers’ process and substantive rights. Turning to the present and future, part III juxtaposes RAA 2017 provisions with IRL standards, as complemented and enhanced by international human rights law (IHRL), in five main areas: exclusion from refugee status; access to asylum; asylum processing centres and restrictions on movement; access to employment and education; and restrictions of political activities. In turn, part IV outlines three potential (non-exhaustive) constitutional grounds for challenging the RAA 2017 in SA courts: first, legislative inconsistency, irrationality, and the legality principle; second, disproportionate infringement of the Bill of Rights in view of SA’s treaty obligations; third, the RAA 2017’s manifestly retrogressive nature. Given the enhanced interpretive role of IRL & IHRL, pursuant to s 1A of the RA as amended by the Refugees Amendment Act 33 of 2008 (RAA 2008), a clash between fundamental IRL tenets and RAA 2017 provisions appears irreconcilable. It is contended that, when called upon, SA courts must be prepared to declare certain RAA 2017 provisions (and their accompanying Regulations) as unconstitutional. Part V concludes.

B  Legislative commitment

In 1954, Paul Weis bleakly described refugees as a ‘vessel on the open sea … not sailing under any flag’. In 2020, refugees seek legal recognition of their predicament pursuant to international standards; yet, it is national institutions, applying domestic legislation, to whom they most often turn for recognition and protection. In turn, host countries’ compliance with their international obligations occasionally gives way to national considerations, and effective protection of rights for refugees depends both on access to asylum and on judicial remedies for legislative infractions.
On 12 June 1996, post-Apartheid South Africa ratified the 1951 Geneva Convention relating to the Status of Refugees (1951 Convention)\(^1\) and the 1967 New York Protocol relating to the Status of Refugees (1967 Protocol)\(^2\), the latter treaty removing the temporal and regional restrictions on the 1951 Convention’s application.\(^3\) Article 1A(2) of the 1951 Convention stipulates that the term ‘refugee’ ‘shall apply to any person who … owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country’.\(^4\)

Earlier, on 15 December 1995, South Africa became party to the 1969 Convention Governing the Specific Aspects of Refugee Problems in Africa (OAU Convention),\(^5\) which broadens the definition of a ‘refugee’ in the region beyond the 1951 Convention definition to ‘also apply to every person who, owing to external aggression, occupation, foreign domination or events seriously disturbing public order in either part or the whole of his country of origin or nationality, is compelled to leave his place of habitual residence in order to seek refuge in another place outside his country of origin or nationality’\(^6\) (emphasis added).

In 1998, SA enacted the RA, which came into force on 1 January 2000. The Act aims to ‘give effect … to the relevant international legal instruments, principles and standards relating to refugees; to provide for the reception into South Africa of asylum seekers; to regulate applications for and recognition of refugee status; to provide for the rights and obligations flowing from such status; and to provide for matters connected therewith’.\(^7\) Section 3 of the RA broadly adopts the OAU Convention’s expanded refugee definition to determine eligibility

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\(^1\) 28 July 1951, 189 United Nations Treaty Series 150.


\(^4\) Or, in the case of stateless persons, if such a person is ‘outside the country of his former habitual residence as a result of such events’ and ‘is unable or, owing to such fear, is unwilling to return to it’.


\(^6\) Ibid art 1(2). This article does not address the substance of the refugee definition and interrelations between the OAU Convention and the 1951 Convention refugee definitions. See e.g, M Sharpe The Regional Law of Refugee Protection in Africa (2018) 86–88(Presents three alternative approaches: first, a sequential approach, whereby the OAU expanded definition is considered only if an individual does not qualify for refugee status under the 1951 Convention, which is linguistically supported by para 9 of the OAU Convention’s preamble and by the ordering of the definitions in art 1; second, the nature of the claimant’s flight dictates the definitional choice; and, third, an interpretation sensitive to pragmatic considerations, such as ‘mass-influx’ situations which may call for an art 1(2) application). Regarding interpretive practices in SA, see e.g., T Wood ‘Who is a Refugee in Africa? A Principled Framework for Interpreting and Applying Africa’s Expanded Refugee Definition’ (2019) 31(2–3) International Journal of Refugee Law 290, 302(Notes the Western Cape High Court judgment in Harerimana v Chairperson of the Refugee Appeal Board [2013] ZAWCHC 209, (2014) (5) SA 550 (WCC), which held that the Refugee Appeal Board (RAB) erred by failing to consider refugee claims under the OAU definition. Wood suggests that this was ‘the continent’s first explicit judicial consideration of the [OAU] definition’s terms and application’.).

\(^7\) In addition see the Preamble to the RA, proclaiming its purpose is to ‘give effect to the relevant international legal instruments to which South Africa is party and the principles and standards relating to refugees contained within’. RA s 3 incorporates the above OAU refugee categories; s 3(a) adds tribe to the five 1951 Convention
for refugee status. The RA and its implementing 2000 Refugee Regulations (the 2000 Regulations) generally follow the 1951 Convention’s structure, listing exhaustive grounds for exclusion from (s 4) and cessation of (s 5) refugee status, before turning to asylum procedures and ensuing rights. It could be argued that, by enacting the RA, SA was seeking to fulfil its IRL protection obligations in good faith.

C Policy realities

Taking stock of two decades since the commencement of the RA, it appears that SA has significantly backtracked from that legislative commitment. It has done so through the adoption of restrictive policies, unfavourable position papers, and ultimately the enactment of the RAA 2017 which, as part III shows, contains serious breaches of IRL, as complemented by IHRL. The judgments considered in part II reveal that the Executive’s policies have curtailed effective access to asylum, inter alia, through pre-screening procedures; refusal to renew permits originally issued at another Refugee Reception Office (RRO) elsewhere in SA; closure of RROs and foot-dragging in implementation of court orders that instructed their re-opening, as well as corruption in their operation; and refusal to issue permits to delayed applicants. In terms of asylum-seekers’ substantive rights, the Executive has attempted to restrict access to employment, education, basic medical care, and marriage (at least) until and unless asylum-seekers are formally recognised as refugees. Moreover, in the light of declining refugee recognition rates (see part III), the refusal to issue asylum-seeker permits to appellants while their appeals are pending, coupled with significant backlogs in reviewing appeals, has left many in legal limbo. The Executive has also rejected asylum-seekers’ applications for temporary and permanent residence permits that would afford them greater security of residence. Concomitantly, detention practices have breached legislatively prescribed periods and the requirement to keep immigration detainees separately from criminal detainees. Most distressingly, SA authorities have attempted to deport persons whose cases were pending. The

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8 The refugee definition in s 3 of the RA goes further than the OAU definition, adding the words ‘or disrupting’ to the ground of ‘events seriously disturbing public order’.
9 Refugee Regulations (Forms and Procedure), published on 6 April 2000 in Government Gazette No 21075.
10 Generally also see F Khan and T Schreier (eds) Refugee Law in South Africa (2014).
above measures, which the 2016 *Green Paper*\(^{12}\) and 2017 *White Paper*\(^{13}\) broadly endorse, reveal an ideological turn from the welcoming spirit of the RA.

With refugee crises the world over, restrictive asylum policies may be (considered) electorally popular. Moreover, despite a history of persecution that is deeply embedded in the majority population’s consciousness, and despite the support that southern African countries offered to the liberation movement in the struggle against Apartheid,\(^{14}\) a 2018 Pew research survey revealed greater resistance to welcoming refugees in South Africa than in most surveyed countries. Responding to the question ‘thinking about immigration, would you support or oppose [your country] taking in refugees from countries where people are fleeing violence and war’, 48% supported the proposition and 50% opposed it.\(^{15}\) The year 2019 has also seen a resurgence of xenophobic attacks against migrants, including refugees, at a level not witnessed in SA since 2008.\(^ {16}\)

**D  South Africa’s ‘international law friendly’ Constitution**

The South African Constitution has been described as ‘international law friendly’.\(^ {17}\) It pronounces that (all) courts *must* consider international law in interpretation of the Bill of Rights;\(^ {18}\) that when interpreting legislation, courts must prefer any reasonable interpretation that is consistent with international law over any other interpretation\(^ {19}\); and that customary international law (CIL) must be treated as law in SA, except where it is in conflict with the Constitution or an Act of Parliament.\(^ {20}\) Debates have arisen in SA as to the desirable


\(^{14}\) J Handmaker, Lee Anne de la Hunt, & Jonathan Klaaren (eds) *Advancing Refugee Protection in South Africa* (2008) 4 (Notes that the new SA’s refugee policy was crafted by a government largely staffed by former refugees). The EU median was: 77% support, 21% oppose (Hungary being the outlier: 32% support, 54% oppose). Elsewhere, globally, only Russia and Israel had worse refugee support levels, available at https://assets.pewresearch.org/wp-content/uploads/sites/1/2018/09/18141059/FT_180919_AttitudesRefugees_Topline.pdf.

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\(^{17}\) E Cameron ‘Constitutionalism, Rights, and International Law: The Glenister Decision’ (2013) 23(2) *Duke Journal and Comparative & International Law* 389 (Notes that, instead of treating international law as an enemy, the Constitution embraced it). See also *Law Society of South Africa v President of Republic of South Africa* [2018] ZACC 51, 2019 (3) SA 30 (CC) at para 4 (suggesting that international law’s ‘centrality in shaping our democracy is self-evident’).


\(^{19}\) Ibid s 233.

\(^{20}\) Ibid s 232.
methodology of identifying relevant sources of international law\textsuperscript{21} and the (differential) weight\textsuperscript{22} to be accorded to binding and non-binding\textsuperscript{23} international instruments in interpreting the Constitution.\textsuperscript{24}

Yet, these important challenges would not have ordinarily arisen when it came to the interpretation and application of IRL (and IHRL) in an asylum context, given the RA’s bespoke interpretive framework which enumerates the key treaty sources. Since its inception, s 6 of the RA has stipulated that the Act ‘must be interpreted and applied with due regard’ to the 1951 Convention, 1967 Protocol, 1969 OAU Convention, 1948 Universal Declaration of Human Rights,\textsuperscript{25} and ‘any other international human rights law instrument to which the Republic is party’.\textsuperscript{26} In turn, art 5 of the 1951 Convention stipulates that ‘nothing in this Convention shall be deemed to impair any rights and benefits granted by a Contracting State to refugees apart from this Convention’. Given the favourable general constitutional interpretive framework and the RA-specific interpretive instruction, one could have expected IRL, reinforced and complemented by relevant international human rights instruments,\textsuperscript{27} to have played a dominant role in SA courts’ asylum case law. Has it?

\textsuperscript{21} D Tladi ‘Interpretation and International Law in South African Courts: The Supreme Court of Appeal and the Al Bashir Saga’ (2016) 16 African Human Rights Law Journal 310, 336(Contends that, SA courts have, generally, struggled with the methodological questions of the interpretation and identification of international law. He argues that courts should apply the international rules of interpretation and identification of international law when dealing with international law, such as arts 26 (good faith) and 31 (interpretation) of the Vienna Convention on the Law of Treaties, to which South Africa is not a party) See also Law Society (note 17 above)

\textsuperscript{22} Government of RSA v Grootboom [2000] ZACC 19, 2001 (1) SA 46 (CC) at para 26(relevant international law can be a guide to interpretation but the weight to be attached to any particular principle or rule of international law will vary).

\textsuperscript{23} S v Makwayane [1995] ZACC 3, 1995 (3) SA 391 (CC) at para 35(Refers to ‘international agreements and customary international law’ as a ‘framework’ within which the Bill of Rights ‘can be evaluated and understood’ and thereby confirming its relevance to Bill of Rights interpretation).

\textsuperscript{24} The debate was largely prompted by the judgment in Glenister v President of the Republic of South Africa [2011] ZACC 6, 2011 (3) SA 347 (CC). For discussion see J Tuvoninen ‘The role of international law in constitutional adjudication: Glenister v President of the Republic of South Africa’ (2013) 130(4) South African Law Journal 661.


\textsuperscript{27} Regarding the interrelations between IRL and IHRL, the key premise that guides this article, following a systemic integration approach to treaty interpretation, is that IHRL complements IRL and aids its interpretive construction. See e.g. V Chetail ‘Human Rights Law and Refugee Protection’ in C Costello, M Foster & J McAdam (eds) The Oxford Handbook of International Refugee Law (forthcoming) (positing that ‘no one contests today that, in states parties to the [1951] Geneva Convention, refugees are simultaneously protected by specialised treaties of refugee law as a specific category of international concern, as well as by generalist
E Judicial rectifications?

South Africa is a major refugee-hosting country, predominantly from elsewhere in Africa. It has litigious civil-society organisations which have been making extensive use of constitutionally protected standing, extended to ‘anyone acting in the public interest’, and a (duly) expansive jurisdictional notion which accommodates legal challenges to measures such as those described in subsection C above at all judicial levels — High Courts, Supreme Court of Appeal, and ultimately the Constitutional Court (the Court). In their asylum adjudication over the past 20 years, SA courts have been forced to square the protective premises of the RA with Executive policies designed to limit access to asylum procedures and to deny asylum-seekers substantive rights. In so doing, SA courts have extended constitutional protection to all those physically in the Republic, irrespective of their legal status. They have utilised the fundamental IRL principle of nonrefoulement, recognised in s 2 of the RA, to bridge a protection gap between an ‘asylum-seeker’ (per the RA) and an ‘illegal foreigner’ (per the Immigration Act 11 of 2002 [IA]), enabling access to the asylum process through insistence on issuance or renewal of asylum permits. Courts have also construed the constitutional right to dignity to facilitate asylum-seekers’ (partial) access to employment, to basic medical care, to education, and to marry South Africans, which the Executive sought to deny through directives, regulations, and other policies.


29 Lawyers for Human Rights & Another v Minister of Home Affairs & Another [2004] ZACC 12, 2004 (4) SA 125 (CC) (LHR) at paras 14–15 (Notes that s 38 of the Constitution ‘introduces a radical departure from the common law in relation to standing’, including ‘expressly allowing court proceedings by individuals or organisations acting in the public interest.’)


31 Compare R Amit ‘(Dis)placing the Law: Lessons from South Africa on Advancing U.S. Asylum Rights’ (2018) 20 Loyola Journal of Public Interest Law 1 (Argues that court victories prove hollow, given the DHA not only routinely fails to implement court orders, but also continues to engage in illegal practices, and suffers no repercussions for its defiance).
Yet, in their asylum adjudication, SA courts have also practised a form of ‘decisional minimalism’\(^{34}\) that is ‘cautious, incremental, particularistic and theoretically modest’\(^{35}\) regarding their use of international law. They have rarely (if ever) used the international instruments listed in the RA as their primary interpretive source. An analysis of the numerous cases referenced in this article reveals that only three judgments mentioned in passing s 6(1) of the RA’s ‘due regard’ interpretive requirement, and none have proceeded to consider properly its normative significance. Cursory references to s 39(1)(b) or s 233 of the Constitution notwithstanding,\(^{36}\) one is hard-pressed to find ‘real consideration’ of IRL (or indeed IHRL) treaties,\(^{37}\) let alone an ‘international-law-first approach’\(^{38}\) in which tenets of IRL are the starting premise for substantive appraisal\(^{39}\) and where, critically, the logic of international protection is applied. Indeed, some judgments merely allude to SA’s international obligations without spelling them out.\(^{40}\)

Had South African courts seriously engaged with the s 6(1) of the RA interpretive sources, they would have sought to question the normative premise underlying the policy measures affecting asylum-seekers that they had been called upon to review: namely, that until and unless a person is granted refugee status, however long that process takes and irrespective of causes for delay, asylum-seekers are not entitled to substantive protections attached to (recognised) refugee status. Yet, a fundamental tenet of IRL is that ‘the recognition of refugee status is a

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34 Compare J Tuovinen ‘What to Do with International Law? Three Flaws in Glenister’ (2014) 5 Constitutional Court Review 435(Critiques the prominence of international law in that judgment in lieu of an engagement with substantive rights).


36 For instance, see Minister of Home Affairs v Ruta [2017] ZASCA 186, 2018 (2) SA 450 (SCA) at para 31.

37 H Strydom & K Hopkins ‘International law’ in S Woolman et al (eds) Constitutional law of South Africa: Vol 2 (2013) 30-11(Notes in general that, while South African courts have been referencing international human rights law, there is little evidence of ‘real consideration’).


39 Compare Mail and Guardian Media Ltd & Others v Chipu NO & Others [2013] ZACC 32, 2013 (6) SA 367 (CC) at para 22 (Commences the ‘background’ section with an outline of the relevant international law norms and then returns to analyse the exclusion clause). In Tantoush v Refugee Appeal Board [2007] ZAGPHC 191, 2008 (1) SA 232 (T) at para 112, the High Court noted that counsel for the applicant’s urged the court to adopt a contextual approach ‘having regard to the provisions and intention of the treaty … expressly mandated by section 6(1) of the Act’. In Tshiyombo v Refugee Appeal Board [2015] ZAWCHC 170, 2016 (4) SA 469 (WCC) at para 28, the High Court referred to the Act’s long title, Preamble, and s 6. Regarding burden of proof, Tantoush and Tshiyombo both reference the UHNCR Handbook on Procedures and Criteria for Determining Refugee Status and Guidelines on International Protection (revised February 2019), at paras 196–197 and at para 37, respectively (UNHCR Handbook on Procedures).

40 For example, see Somali Association of South Africa & Others v Limpopo Department of Economic Development Environment Tourism & Others [2014] ZASCA 143, 2015 (1) SA 151 (SCA) at para 43(Notes that ‘the frustration experienced by the authorities as they deal with a burgeoning asylum seeker and refugee population must not blind them to their constitutional and international obligations’). Far fewer judgments refer to IHRL instruments. Compare T Daly ‘Kindred Strangers: Why has the Constitutional Court of South Africa Never Cited the African Court on Human and Peoples’ Rights?’ (2019) 9 Constitutional Court Review 387.
declaratory act’,41 notwithstanding the practical significance of recognition.42 The UNHCR Handbook on Procedures famously postulates that

A person is a refugee within the meaning of the 1951 Convention as soon as he fulfils the criteria contained in the definition. This would necessarily occur prior to the time at which his refugee status is formally determined. Recognition of his refugee status does not therefore make him a refugee but declares him to be one. He does not become a refugee because of recognition but is recognised because he is a refugee.43

Section 1(v) of the RA, which legislative amendments including the RAA 2017 have not modified, explicitly adopts this principle by defining an ‘asylum seeker’ as ‘a person who is seeking recognition as a refugee’ (emphasis added).44 In turn, s 27(a) of the RA pronounces that a refugee ‘is entitled to a formal written recognition of refugee status’ (emphasis added).

Ultimately, it is because recognition of a person as a refugee is declaratory that asylum-seekers must enjoy unhindered access to a fair Refugee Status Determination (RSD) process, lest they should be exposed to refoulement prior to having their claims assessed.45 Having been granted such access, and following submission of an asylum application, asylum-seekers should be considered ‘presumptive refugees’46 until and unless their claim has been duly and finally rejected following a fair procedure. Therefore, the onus is on host country authorities to justify why asylum-seekers whose applications are pending should be denied access to rights that are otherwise available to refugees, rather than assume this should be the legal default. Administrative backlogs and staffing shortages should not be ‘rewarded’ by relying on them as a basis for denial of rights.47

Yet, in cases where SA courts have quashed restrictive policy measures as unconstitutional or instructed the Executive to (re)issue asylum permits, they have not sought to appraise the compatibility of policies with IRL as such by interpreting the enumerated sources in s 6(1) of the RA; nor have they predicated their analysis on the declaratory nature of refugee status. It is contended that, had courts engaged properly with the Republic’s treaty obligations, the protective outcome of certain judgments would be more durable: the normative foundations would have been laid for the inevitable constitutional appraisal of RAA 2017 provisions.

41 For example, see Preamble of Directive 2011/95/EU of the European Parliament and of the Council of 13 December 2011 on Standards for the Qualification of Third-Country Nationals or Stateless Persons as Beneficiaries of International Protection, for a uniform status for refugees or for persons eligible for subsidiary protection, and for the content of the protection granted (recast) OJ 2011 No. L337/9 at para 21. Furthermore, Ruta v Minister of Home Affairs [2018] ZACC 52, 2019 (2) SA 329 (CC) at para 27 alluded to the declaratory nature of refugee status by noting that both de jure and de facto refugees are Convention refugees.

42 C Costello ‘On Refugeehood and Citizenship’ in A Shachar, R Bauböck, I Bloemraad, & M Vink (eds) Oxford Handbook on Citizenship (2017) 729–730 (Posits that, ‘being protected against refoulement often generates precarity, as it does not bring with it a particular status for the non-removable person … the central concern of the Refugee Convention, as its full title indicates, is to recognise refugees as the bearers of a particular status’).


44 In turn, s 1(xv) of the RA defines a ‘refugee’ as any person who has been ‘granted asylum in terms of this Act’.

45 UNHCR Note on International Protection (31 August 1993) at para 11.


47 For example, see J Hathaway The Rights of Refugees under International Law (2005) 158 (Argues that ‘genuine refugees may be fundamentally disadvantaged by the withholding of rights pending status assessment.’).
Part II appraises core challenges to SA’s asylum policies over the past two decades. It reveals how courts have utilised the Constitution to bridge (some) protection gaps but have largely refrained from employing SA’s IRL obligations in their analyses, leaving the legal terrain (more) vulnerable to the adverse effects of RAA 2017.

II TWO DECADES OF ASYLUM ADJUDICATION: GAPS-BRIDGING

A The nonrefoulement conundrum

Two intersecting regimes govern the treatment and status of persons seeking protection in SA: the RA and the IA. The IA distinguishes between ‘foreigners’ and ‘illegal foreigners’. A foreigner ‘means an individual who is neither a citizen nor a resident but is not an illegal foreigner’. An illegal foreigner ‘means a foreigner who is in the Republic in contravention of this Act’ (emphases added). Whereas ‘foreigners’ holding an asylum-seeker permit (renamed ‘visa’ for unspecified reasons by the RAA 2017) that is issued pursuant to s 22 of the RA are not considered ‘illegal foreigners’, those who, for procedural or substantive reasons, are denied permits or refused their renewal are at risk of deportation under the IA. As the Saidi and Arse judgments (see part IIB below) confirmed, in law, the mere refusal to issue or renew s 22 permits does not necessarily authorise immigration authorities to subject an asylum-seeker to the wrath of the IA; yet, practically, refusal or withdrawal of a s 22 permit may expose such an asylum-seeker to risks of arrest, detention, and deportation.

The challenge in respect of ‘illegal foreigners’ arises due to s 2 of the RA, which gives primacy to nonrefoulement ‘notwithstanding any provision of this Act or any other law to the contrary’. The consequences are profound: even ‘illegal foreigners’ are normatively shielded by s 2, leaving them in legal limbo: they cannot be refouled, but until and unless they are issued a permit they cannot enjoy the rights accorded to asylum-seekers in legislation and


49 Courts have considered challenges to detention practices of ‘illegal migrants’. Minister of Home Affairs v Rahim [2016] ZACC 3; (2016) (3) SA 218 (CC)(Holds that the MHA must have regard to international norms for the detention of those who fall foul of immigration regulation); Lawyers for Human Rights v Minister for Home Affairs & Others [2017] ZACC 22; 2017 (5) SA 480 (CC)(Holds that ss 34 (1)(b) and (d) of the IA violate s 35(2)(d) of the Constitution, guaranteeing the right to challenge detention in court, as well as s 12(1), guaranteeing freedom and security of the person, including the right not to be detained without trial; the declaration of invalidity was suspended for 24 months). For challenges facing migrants in SA generally see e.g. T Alfaro-Velcamp & M Shaw ‘Please go HOME and BUILD Africa: Criminalising Migrants in South Africa’ (2016) 42(5) Journal of African Studies 983 (Describes the criminalisation of migrants in SA through compelling them to purchase documents through illicit means, and the SA police service conducting raids and illegally detaining migrants).

50 Section 2 reads: ‘Notwithstanding any provision of this Act or any other law to the contrary, no person may be refused entry into the Republic, expelled, extradited or returned to any other country or be subject to any similar measure, if as a result of such refusal, expulsion, extradition, return or other measure, such person is compelled to return to or remain in a country where — (a) he or she may be subjected to persecution on account of his or her race, religion, nationality, political opinion or membership of a particular social group; or (b) his or her life, physical safety or freedom would be threatened on account of external aggression, occupation, foreign domination or other events seriously disturbing or disrupting public order in either part or the whole of that country.’
judicial pronouncements. As the Ruta judgment stated, ‘[t]hough an asylum seeker who is in the country unlawfully is an “illegal foreigner” under the Immigration Act, and liable to deportation, the specific provisions of the Refugees Act intercede to provide imperatively that, notwithstanding that status, his or her claim to asylum must first be processed under the Refugees Act.’ 51

Part IIB considers the utilisation by courts of nonrefoulement to facilitate access to the SA asylum procedure. Part IIC turns to asylum-seekers’ substantive rights. Fundamentally, s 27 of the RA stipulates refugees’ access to (certain) rights but speaks not of asylum-seekers — with the Executive’s default position being denial of such rights. Whereas the SA judiciary has extended many such rights to asylum-seekers, rarely has it utilised IRL tenets in so doing.

B  Access to asylum: jurisdiction, refugee reception offices, and asylum permits

1  An ‘inadmissible facility’ at/near the SA border

The first practical hurdle to accessing asylum procedures in SA is admission. Section 2 of the RA lists refusal of entry to the Republic as one of the manifestations of refoulement, following express stipulation to that effect in the OAU Convention (viz. the 1951 Convention). The Supreme Court of Appeal (SCA) held that asylum applicants in an ‘inadmissible facility’ at a Port of Entry (PoE) into the Republic enjoy the protection of the RA and of the courts, and that they should be given ‘every reasonable opportunity’ to apply. 52 Importantly, the court postulated that ‘refusing a refugee entry to this country, and thereby exposing her or him to the risk of persecution or physical violence in his home country is in conflict with the fundamental values of the Constitution.’ 53

2  Issuance of appointment slips and ‘pre-screening’ procedure

For in-country applicants, the key challenge to effective protection from refoulement is having access to an RRO where a Refugee Status Determination Officer (RSDO) issues them an asylum-seeker permit. Section 21 of the RA stipulates that ‘An application for asylum must be made in person in accordance with the prescribed procedures to a Refugee Reception Officer at any Refugee Reception Office’. In turn, officers are required to assist asylum seekers in filling out their applications and to issue them permits. 54

Yet, in the early 2000s, the Johannesburg and Pretoria RROs implemented two policies that undermined access to the asylum procedure: first, an ‘appointment system’ whereby applicants were given an appointment slip dated as far away as six months to a year; until their appointment date, applicants would remain ‘illegal foreigners’ and potentially liable to be arrested, detained, and deported pursuant to ss 32, 33 and 34 of the IA. Second, a ‘pre-screening’ process whereby applicants had to fill a form at a RRO car park without any assistance and without the benefit of interpreters; the form had two questions (why they were applying for asylum, and why they left their country/what would happen if they returned) and, based on their answers, RSDOs made decisions in their cases. The Transvaal High Court held both policies to be ‘unconstitutional and unlawful in respect of the manner of scheduling

51 Ruta (note 41 above) at para 43.
52 Abdi (note 32 above).
53 Ibid at para 2.
54 RA s 21 regulating the issuance of s 22 permits.
appointments and in respect of the pre-screening method adopted’.\(^{55}\) It emphasised that ‘[n]o amount of administrative inconvenience can absolve the respondents of their legal and constitutional responsibility’.\(^ {56}\) Disappointingly, an appointment slip system was introduced in 2018 at the Port Elizabeth RRO, resulting in yet another successful court challenge.\(^ {57}\)

3 Refusal to renew a permit originally issued at another RRO

Many asylum-seekers will have entered SA, received an asylum permit at an RRO in one part of the country, and landed up residing elsewhere, for family or employment reasons. The Cape Town RRO (CTRRO) refused to renew asylum permits issued at other RROs, leaving asylum-seekers in possession of expired permits, susceptible to immigration control. The policy was successfully challenged,\(^ {58}\) yet the Western Cape High Court judgment, ordering the renewal of permits, remains overshadowed by the failure to re-open the CTRRO (see part IIB5 below).

4 Staffing shortages at RROs

Access to the asylum process was further curtailed by rationing daily application numbers at RROs. In Kiliko,\(^ {59}\) Congolese citizens argued that the CTRRO accepted only 20 asylum applications each day. Rejecting this policy, the High Court held that ‘foreigners were entitled to all the fundamental rights entrenched in the Bill of Rights, save those specifically reserved for South African citizens’ and that their ‘illegal foreigner’ status (absent s 22 permit) ‘impacted, or threatened to impact’ on their ‘right to human dignity’ and on their ‘freedom and security’.\(^ {60}\) It emphasised that SA ‘was obliged, in terms of the international instruments to which it was a party [without specifying which], the Refugees Act and the provisions of ss 7(2) and 195 of the Constitution, to provide adequate facilities to receive, expeditiously consider and issue asylum-seeker permits.’\(^ {61}\)

5 Closure of RROs in Cape Town and Port Elizabeth

Given SA’s manifold Points of Entry (PoEs),\(^ {62}\) ensuring effective access to asylum requires operating RROs throughout the Republic. Before 2011, there were six active RROs: Johannesburg, Pretoria, Port Elizabeth, Cape Town, Durban, and Musina (close to the Zimbabwean border). Yet, in May 2011, the Johannesburg RRO closed entirely, in October 2011 the Port Elizabeth RRO closed to new applicants, and in July 2012 the CTRRO closed to new applicants. Consequently, asylum-seekers already in SA, residing in the Western and Eastern Cape, had to frequently travel to Pretoria, Durban or Musina to renew their permits;

\(^{55}\) Tafira v Ngozwane 2006 ZAGPHC 136 (TPD) at 46.

\(^{56}\) Ibid at 22.

\(^{57}\) Huda & Another v Minister of Home Affairs (PEHC, unreported case no. 2434/2019).

\(^{58}\) Ntumba Guella Nbaya v Director-General of the Department of Home Affairs (WCHC, unreported case no. 6534/15) (copy with author)(Re challenges arising for families due to difficulties regarding marriage certificates). See also Scalabrini Centre of Cape Town v Minister of Home Affairs (WCHC, unreported case no. 5242/2016) (copy with author) discussed in K Moul ‘Sally Gandar and Popo Mfubu: on the record’ (2019) 68 South Africa Crime Quarterly 41(Challenges joint application procedures for families).

\(^{59}\) Kiliko & Others v Minister of Home Affairs & Others [2008] ZAWCHC 124, 2006 (4) SA 114 (C).

\(^{60}\) Ibid at paras 27–28.

\(^{61}\) Ibid at para 28.

and applicants arriving through Western and Eastern Cape PoEs and issued there, as required, an asylum transit permit, had to travel significant distances at great expense within a short period to avoid becoming ‘illegal foreigners’.

The closures of RROs in Port Elizabeth and Cape Town prompted judicial challenges (two in the case of the latter) that ultimately led courts to order their re-opening. In *Somali Association*, the SCA noted in respect of the closure of the Port Elizabeth PoE that ‘[T]he asylum application process is invariably a protracted one. Timely access to an RRO is thus critical not just for asylum seekers to legalise their stay in this country, but also for the effective protection of their rights.’ The SCA highlighted the adverse effect of the [Port Elizabeth] RRO closure on ‘asylum-seekers’ ability to choose their place of residence, not least in light of their need to join family, acquaintances and communities that are already established and who are able to help support them on arrival.’ The court stated that ‘repeated visits to a distant RRO also have the potential to jeopardise the employment and job security of an asylum seeker.’

As for the closure of the CTRRO, in *Scalabrini (I)*, the SCA was reticent to order its re-opening: instead, it required the Director-General to consult with interested parties. The SCA was sympathetic to the respondents, noting that ‘[t]he obligations of the government to refugees are neither unrestrained nor unconfined. The material resources of governments are limited.’ According to Willis J, there cannot be, inherently, a ‘legitimate expectation … on the part of anyone to have an RRO in any specific geographic location in the country, including Cape Town.’ The judgment gave the Director-General time to consult with interested parties before deciding on the future of the RRO.

Several years of closure on, a second challenge ensued (*Scalabrini (II)*). This time, the SCA ordered the re-opening of the CTRRO by 31 March 2018 ‘to ensure the immediate protection of their [asylum-seekers’] rights and the determination of their status in accordance with international standards’. The DHA Director-General argued that ‘refugee services were being abused by economic migrants’ since 77% of applications at that office were rejected’. The SCA rejected this claim, noting that, on its own terms, the statement implies ‘denial of access to a refugee reception office to 23% of genuine asylum seekers’ and, consequently, denying them

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63 At the time of writing, despite the SCA order in *Scalabrini (II)* (note 69 below), the CTRRO had still not received any new applications: Reply to Question NW1456 to the Minister of Home Affairs (24 December 2019) (Notes that a lease agreement could not be finalised and that once finalised the building obtained will need to be refurbished before the office can be re-opened). Moreover, despite the *N Sabha* court order, the CTRRO initially refused to renew asylum-seekers’ permits issued at other RROs. It then began renewing such permits with one month’s validity, until such time as the relevant asylum file was transferred to the CTRRO. Meanwhile, asylum-seekers whose permits had expired were taken to the police station; were required to attend a court hearing; and issued with an ‘admission of guilt’ fine. The Scalabrini Centre launched litigation in respect of both the failure to comply with *Scalabrini (II)* and the failure to properly implement *N Sabha*, seeking the appointment of a Special Master to oversee DHA compliance (copy on file with author).

65 Ibid at para 4.
66 Ibid at para 28.
67 Ibid at para 29.
69 *Scalabrini Centre & Others v Minister of Home Affairs and Others* [2017] ZASC A 126, 2018 (4) SA 125 (SCA).
70 Ibid at para 35.
economic opportunities in Cape Town; it held that the RA ‘reveals a clear, general orientation towards the protection of the rights of asylum seekers and refugees and their integration into South African society’.

The CTRRO closure effectively imposed restrictions on asylum-seekers and refugees’ choice of place of residence. The Scalabrini (II) judgment included a rare reference in South African jurisprudence to a substantive right in IRL, art 26 of the 1951 Convention, which stipulates that ‘refugees lawfully in [the asylum country’s] territory’ should have ‘the right to choose their place of residence and move freely within its territory subject to any regulations applicable to aliens generally in the same circumstances’. The SCA also referenced (but did not discuss) the interpretive requirement in s 6 of the RA. The judgment did not appraise, as per art 26, whether asylum-seekers and refugees are ‘generally in the same circumstances’ as other ‘aliens’ on whom such effective residence restrictions are not imposed.

6 Refusal to issue a permit to a delayed applicant

The Court in Ruta considered the legal ramifications of a 15 months’ delay in submitting an asylum application. Logically, the declaratory nature of refugee status must be front and centre of any such legal assessment, given that a decision to deny an applicant access to the asylum system merely on lateness grounds could effectively deny a 1951 Convention refugee status — and protection. The applicant, a Rwandan who entered SA irregularly via Zimbabwe, sought to apply for asylum following his arrest for a driving offence. In a compelling judgment, Cameron J held that a delay ‘did not diminish his [Ruta’s] entitlement to apply’ even though ‘[i]t is a crucial factor in determining credibility and authenticity’. The judgment’s reasoning heavily relies on the primacy of nonrefoulement within the RA structure. Moreover, the judgment acknowledges, though does not explicitly reference, the IRL notion of refugees sur place who ‘enter the country of refuge on one basis but thereafter supervening events in their country of origin involuntarily render them refugees’ in respect of whom ‘delayed’ applications are a built-in feature of their predicament. The judgment also recognises that ‘[a]sylum seekers do not arrive only where they should, nor do they always have the opportunities and agency to claim what they should’, yet it misses an opportunity to apply the non-penalisation principle in art 31(1) of the 1951 Convention, which enjoins host

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71 Ibid at para 61.
73 Ibid at para 19.
74 Ruta (note 41 above).
75 Ibid at para 4.
76 Ibid at para 56.
77 UNHCR Handbook on Procedures (note 39 above) at paras 94–96. Re refugees sur place, see also AI v Director of Asylum Seeker Management [2019] ZAWCHC 114 (2 September 2019)(States that the DHA must issue an asylum seeker permit to Burundian nationals whose initial applications for refugee status had been rejected, but who wished to lodge sur place applications).
78 Ruta (note 41 above) at para 51.
countries from imposing penalties on refugees for their unlawful entry or presence, provided certain criteria are met (for discussion, see part IIIB).

7 Refusal to renew permits for asylum appellant

_Saidi_79 concerned the CTRRO’s refusal to renew the applicants’ permits as they were awaiting the outcome of judicial reviews, following rejections of their asylum applications by RSDOs and failed appeals. The Court held by a majority (Jafta J dissenting) that s 22(3) of the RA mandates an RSDO to extend asylum-seekers’ permits where the outcome of their application (read to mean final determination80) is pending; the judgment interpreted the word ‘may’ in the provision to mean ‘must’. The judgment reiterated that ‘[w]ithout a temporary permit, there is no protection. This runs counter [to] the very principle of non-refoulement and the provisions of section 2’.81 It emphasised that permits ‘prevent undue disruption of a life of human dignity … and communing in ordinary human intercourse without undue state interference’.82

The Court emphasised that ‘courts must adopt a purposive reading of statutory provisions’, noting the RA requires its interpretation to be made with ‘due regard’ to 1951 Convention,83 and referencing the s 233 constitutional requirement; yet, it did not frame the requirement to issue or extend s 22 of the RA permits in terms of a non-refoulement obligation pursuant to art 33 of the 1951 Convention. Nevertheless, its judgment does cite (approvingly) Pinto de Albuquerque J’s endorsement of the UNHCR _Handbook on Procedures_ stipulation that ‘the determination of refugee status is merely declaratory’ in his separate opinion in _Hirsi_ (a European Court of Human Rights judgment concerning interdiction at sea).84

8 Refusal to (re)issue permits to detainees

It was noted above that absent a s 22 permit, asylum-seekers as ‘illegal foreigners’ are susceptible to detention. Indeed, s 23(2) of the IA provides that ’[d]espite anything contained in any other law’ the holder of an asylum transit permit becomes, on expiry of the permit, an ‘illegal foreigner’ liable to be dealt with under the IA. Yet, s 21(4) of the RA stipulates that ‘[n]otwithstanding any law to the contrary, no proceedings may be instituted or continued against any person in respect of his or her unlawful entry into or presence in the country if that person has applied for asylum in terms of section 21(1) until a decision has been made on his or her application and that person has had an opportunity to exhaust his or her rights of review or appeal in terms of the Refugees Act’.

In _Arse_,85 the SCA ordered release from detention of an Ethiopian asylum-seeker whose permit had expired and whose application for asylum had been rejected by an RSDO but

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79 _Saidi v Minister of Home Affairs & Another_ [2018] ZACC 9, 2019 (1) SA 1 (CC).
80 Ibid at para 20.
81 Ibid at para 30.
82 Ibid at para 18.
83 Ibid at para 29.
84 Ibid at para 34. App No 27765/09 _Hirsi Jamaa v Italy_ (GC) (23 February 2012) at pages 64–66. The judgment found that, Italy had breached its non-refoulement obligations arising from art 3 of the European Convention on Human Rights, 4 November 1950, 213 _United Nations Treaty Series_ 221, by intercepting at sea boats carrying Somalis and Eritreans and then returning to Libya without examining their protection claims, thereby exposing them to a risk of ill-treatment.
whose appeal was pending before the RAB. The SCA also ordered that he be issued with an asylum permit which would be valid until the final adjudication of an asylum claim, including all rights of appeal and review. Attempting to reconcile the two provisions, the SCA held that s 23(2) of the IA ‘ceases to be of application when an asylum seeker permit is granted to an ‘illegal foreigner’’.86

Bula87 concerned the fate of 19 Ethiopian asylum-seekers who had arrived in Johannesburg and were detained shortly thereafter. After their transfer to the Lindela holding facility, and following a meeting with Lawyers for Human Rights, they had written to the DHA seeking to halt their impending deportation, demanding their release and an opportunity to apply for asylum. Absent a response, they sought judicial review. The SCA held that, ‘once an intention to apply for asylum was evinced, the protective provisions of the RA…come into play and the asylum seeker is entitled as of right to be set free subject to the provisions of the [Refugees] Act.’88 It thus interdicted the Executive from deporting the applicants, declared their detention unlawful, ordered their release, and authorised their lawful stay for 14 days in order to apply for asylum at an RRO — where they would be issued a s 22 permit.

Ersumo89 involved an Ethiopian asylum-seeker who was detained after failing, before his arrest, to obtain a permit due to queues (first) at the Pretoria RRO and (subsequently) at CTRRO. The SCA noted that, while reg 2(1) of the 2000 Regulations stipulates that an application must be submitted without delay, neither it nor the RA prescribes a time for such submission.90 The SCA ordered issuance of an asylum transit permit (which at the time was valid for 14 days), release from detention, and priority at the Port Elizabeth RRO; and, upon submission of an asylum application, the issuance of a s 22 asylum permit.91

C Asylum-seekers’ rights and the constitutional role of dignity

1 The constitutional right to dignity and its application to asylum-seekers

Part IIB surveyed judicial responses to the Executive’s attempts to curtail asylum-seekers’ access to asylum procedures. This paragraph turns to its endeavour to deny asylum-seekers access to substantive rights which others, including recognised refugees, enjoy. It is contended that, rather than rely on IRL principles to compel authorities to guarantee such rights, courts have opted for utilisation of the constitutional right to dignity in s 10 of the Bill of Rights, which provides: ‘Everyone has inherent dignity and the right to have their dignity respected and protected.’ Yet, absent constitutional articulation of asylum-specific rights, reliance on IRL tenets would have buttressed protection claims, rendering them more resilient to prospective challenges.

Early on in its asylum jurisprudence, the Court clarified the scope of applicability of constitutional rights. In its Lawyers for Human Rights judgment, it held that they apply to ‘human beings who are physically inside the country at sea or airports’, given that the determination of the question whether a person is an illegal foreigner ‘could adversely affect

86 Ibid at para 19.
88 Ibid at para 80.
90 Ibid at para 15.
91 Ibid at para 21.
not only the freedom of the people concerned but also their dignity’.92 The Tsebe judgment, upholding a lower court’s proscription of extradition to Botswana, emphatically stated: ‘The human rights provided for in sections 10, 11 and 12 of our Constitution are not reserved for only the citizens of South Africa. Every foreigner who enters our country — whether legally or illegally — enjoys these rights and the State’s obligations contained in section 7(2) are not qualified in any way.’93

Subsection 2 explores judgments concerning asylum-seekers’ access to substantive rights; and subsection 3 addresses attempts to restrict their eligibility for less precarious legal statuses.

2 Access to substantive rights: employment, education, and marriage

Section 27 of the RA enumerates rights to which (recognised) refugees are entitled. Inter alia, a refugee (b) ‘enjoys full legal protection, which includes the rights set out in Chapter 2 of the Constitution and the right to remain in the Republic in accordance with the provisions of this Act’.94 Refugees are also entitled to an identity document, SA travel document, and the rights to ‘seek employment’ and to enjoy ‘the same basic health services and basic primary education which the inhabitants of the Republic receive from time to time’.95

Notably, nothing in the RA enjoins asylum-seekers qua s 22 permit holders from accessing the s 27 enumerated rights. Yet, the Executive has sought to differentiate between asylum-seekers and refugees, reluctantly acknowledging the latter’s statutory entitlements while denying them to the former, in respect of employment (both wage-earning and self-employment), education, medical care, and marriage. When courts extended important substantive rights to asylum-seekers, the basis for their intervention was the effect that restrictions would have on asylum-seekers’ human dignity. However, had they given ‘due regard’ to IRL tenets, particularly the normative ramifications of the declaratory nature of refugee status, courts would have been able to rely on the 1951 Convention to bolster protection for asylum-seekers. For instance, regarding employment, art 17 of the 1951 Convention guarantees refugees ‘lawfully staying’ access to wage-earning employment, whereas pursuant to art 18 access to self-employment should materialise as soon as a refugee is ‘lawfully’ in the country.96 Regarding education, Article 22 accords to ‘refugees’ without temporal or others qualifications ‘the same treatment as is accorded to nationals with respect to elementary education’.

Prior to the commencement of the RAA 2017, asylum-seekers’ access to employment and education in SA was predicated on Watchenuka.97 The judgment concerned a Congolese widow, trained and qualified as a pharmacy technician, who entered SA from Zimbabwe with her disabled 20 year old son. Shortly after applying for asylum, she secured a place for her son to study at a Cape Town college; she sought employment to support him and herself. Alas, the Standing Committee on Refugee Affairs (SCRA) prohibited asylum-seekers and their

92 LHR (note 29 above) at paras 20, 26.
93 Minister of Home Affairs v Tsebe [2012] ZACC 16, 2012 (5) SA 467 (CC) at para 65. See also Tantoush (note 39 above) at para 64 (Notes the equal application of the Bill of Rights to ‘foreigners’ and citizens).
94 RA s 27(b).
95 RA ss 27(d), (e), (f) and (g), respectively.
96 1951 Convention arts 17 and 18 respectively. Part IIIE considers whether RAA 2017 provisions that explicitly restrict asylum-seekers’ access to employment and education are compatible with IRL.
family members from taking up employment and from studying during the first six months of holding a s 22 permit.

While the SCA rejected SCRA’s blanket prohibition policy, it accepted the premise that ‘the right to enter and to remain in the Republic, and the right to choose a trade or occupation or profession, are restricted to citizens by ss 21 and 22 of the Bill of Rights’. Notably, both provisions commence with the phrase ‘every citizen’; nevertheless, had the SCA employed a purposive interpretation of the provisions in light of enumerated IRL treaty rights, it could have construed such provisions as a requirement to ensure such rights to citizens, rather than as a constitutional permission to restrict access to such rights only to citizens. Under such construction, SA authorities would be required to justify exclusion of asylum-seekers from access to employment, comparing and contrasting them with other non-citizens — including recognised refugees — who enjoy such access.

The SCA opted instead to appraise the effect of destitution on human dignity, rendered by denial of employment and of access to education. For ‘human dignity has no nationality. It is inherent in all people — citizens and non-citizens alike — simply because they are human. And while that person happens to be in this country — for whatever reason — it must be respected, and is protected, by section 10 of the Bill of Rights’. The SCA held that the general prohibition on asylum-seekers’ access to employment ‘is a material invasion of human dignity that is not justifiable in terms of section 36 [of the Constitution]’ given that asylum-seekers are offered no public support and thus ‘a person who exercises his or her right to apply for asylum, but who is destitute, will have no alternative but to turn to crime, or to begging, or to foraging’. Applying a similar logic in respect of access to education, the SCA held that ‘[t]he freedom to study is also inherent in human dignity for without it a person is deprived of the potential for human fulfilment’.

Whereas Watchenuka ensured asylum-seekers’ qualified access to employment and education and as such was a key driver behind the RAA 2017 (see part III), the judgment failed to articulate rights-enhancing rationales derived from IRL obligations, relying instead on the rather vague and amorphous notions of (in)dignity and vulnerability. In turn, when the question of sector-specific restrictions on employment arose, the absence of IRL tenets in

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98 Ibid at para 25.
99 Ibid at para 32.
100 Ibid at para 36. See also *Governing Body of the Juma Musjid Primary School & Others v Essay NO & Others* [2011] ZACC 13, 2011 (8) BCLR 761 at para 37 (Holds that ‘the right to a basic education in section 29(1)(a) of the Constitution is immediately realisable’). See also *Centre for Child Law v Minister of Basic Education* [2019] ZAECGHC 126 (12 December 2019) where the Eastern Cape High Court affirmed the right to basic education of ‘undocumented’ children, some born of South African parents and others of foreign nationals, noting that denial of access to school has ‘devastating consequences’, which ‘denuded [children] of their self-esteem and self-worth, and the potential for human fulfilment’ and that ‘differentiating the children based on their documentation status impairs their fundamental right to dignity’ which amounted to unfair discrimination prohibited by the Constitution and by the Convention on the Rights of the Child. Ibid at paras 81, 85–86.
101 Also see *Lucien Ntumba Musanga & Others v Minister of Labour & Others* (NGHC, case no. 29994/18, unreported judgment) (Challenged regs 1 & 2 to the Unemployment Insurance Act 63 of 2001, which effectively prevented asylum-seekers from claiming Unemployment Insurance Fund benefits; the case was settled on the day of hearing, 27 February 2019, with a declaration that the impugned regulations were unconstitutional, requiring modification of the system to recognise applications submitted with asylum permit numbers).
102 S Carciotto, V Gastrow, C Johnson *Manufacturing Illegality? The Impact of Curtailing Asylum Seekers’ Right to Work in South Africa* (2017) 5 (Notes that, following Watchenuka, SCRA has issued all asylum permits with the right to work and study).
determining its constitutionality proved decisive. *Union of Refugee Women*103 appraised the exclusion of both asylum-seekers and recognised refugees from security service posts due to the imposition of a citizenship or permanent residence requirement.104 Rejecting the application, the Court held that the restriction had a rational purpose and that it was narrowly tailored by not applying to all industries, notwithstanding its recognition that ‘refugees’ are ‘unquestionably a vulnerable group in our society’.105 The majority dismissed the claim that permanent residents are the relevant comparator for the purposes of appraising ‘unfair discrimination’ as per s 9(3) of the Constitution.

Mokgoro and O’Regan JJ, dissenting, noted that rights which ‘arise from international law … need to be understood in the light of our international obligations’ and that ‘preference should be given to a meaning which is consistent with our international obligations’. They posited that ‘recognised refugees are most similarly situated to permanent residents’.106 Yet, by focusing on recognised refugees, even the dissent implicitly accepted that sectoral restrictions may be imposed on all asylum-seekers, irrespective of the length of their stay in SA and of delays in assessing their applications, thereby refraining from critical engagement with the contours of art 17 of the 1951 Convention and its applicability in SA.

The SCA was subsequently called upon to appraise whether restrictions on self-employment are compatible with art 18 of the 1951 Convention. *Limpopo*107 concerned the refusal of licences and closure of spaza shops, owned and operated by refugees and asylum-seekers in Limpopo Province. The SCA held that ‘if, because of circumstances, a refugee or asylum-seeker is unable to obtain wage-earning employment and is on the brink of starvation, which brings with it humiliation and degradation, and that person can only sustain him- or herself by engaging in trade, … such a person ought to be able to rely on the constitutional right to dignity in order to advance a case for the granting of a licence to trade. This is so given that South Africa has no general social assistance programme for refugees, and none of the existing grants are available to asylum seekers.’108 Notably, in IRL, whereas host countries are expected to provide social assistance,109 employment rights are not derived from and are certainly not contingent on the *absence* of such assistance. Yet, while the SCA reprimanded ‘the attitude of the State in that regard’ as ‘worrying and unacceptable as it would amount to defeating South Africa’s international obligations arising under international refugee and human rights law’,110 it did not articulate which obligations it was referring to, nor base its determination on their breach.

More recently, the SCA was handed a chance to utilise South Africa’s IHRL obligations in respect of the right to marry. *Mzalisi NO*111 concerned a Nigerian asylum-seeker wishing to

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104 Pursuant to s 23(1)(a) of the Private Security Industry Regulation Act 56 of 2001 (but subject to an exemption in s 23(6) which, per *Union of Refugee Women* ibid at para 48 ‘if properly applied will save it from the overbreadth criticism’).
105 *Union of Refugee Women* (note 103 above) at para 28.
107 *Limpopo* (note 40 above).
108 Ibid at para 43.
110 *Limpopo* (note 40 above) at para 44.
register their customary law marriage to a South African. An MHA circular proclaimed that persons ‘whose asylum seeker application status is pending cannot contemplate marriage’.

Given that neither the Marriage Act 25 of 1961 nor the Civil Union Act 17 of 2006 have immigration-related eligibility requirements, the provision was declared invalid, upholding the lower court’s ruling. Yet, in so doing, the SCA judgment did not refer to art 23(2) of the ICCPR, which enunciates that ‘[t]he right of men and women of marriageable age to marry and to found a family shall be recognized’. Rather, the SCA turned to dignity, holding that ‘[t]he right to family life is not a coincidental consequence of human dignity, but rather a core ingredient of it’, citing the Court’s Nandutu judgment, which affirmed the rights of foreign spouses and children to obtain a change in visa status from within SA.

3 Access to temporary and permanent residence permits

While an asylum application is pending, life happens. Asylum-seekers may marry (as above). They may wish to capitalise on the greater security of permanent residence. They may seek assurance of access to rights that are haphazardly denied to s 22 permit holders. Hence, they may want to apply for temporary or permanent residence permits.

The dual predicament that Ahmed addressed was this: the policy of preventing asylum-seeker permit-holders from applying for temporary or permanent residence permits coupled with a requirement that such applications cannot be made in-country. Immigration Directive 21 of 2015 issued on 3 February 2016 by the DHA Director-General stated that ‘[a] holder of an asylum seeker permit who has not been certified as a Refugee may not apply for a temporary residence visa or permanent residence permit.’ Hence, for instance, an asylum-seeker marrying a South African would be ineligible qua asylum-seeker to apply in-country for a spousal visa. The Directive effectively qualified s 31(2) of the IA, which allows the Minister of Home Affairs to, inter alia, ‘grant a foreigner the rights of permanent residence for a specified or an unspecified period when special circumstances exist which justify such a decision.’ Claimants argued that, due to the backlog in the asylum system, especially in respect of Refugee Appeal Board (RAB) appeals, asylum-seekers are stuck indefinitely in a precarious

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112 Circular s 2.1(b)(iii)(dd).
115 Ibid at para 44 (‘an official policy document, which guides government departments on how to apply legislation’).
116 Report of the Auditor-General on a Follow-up Performance Audit of the Immigration Process for Illegal Immigrants at the Department of Home Affairs (February 2020) at para 2.4.(d), available at http://pmg-assets.s3-webste-eu-west-1.amazonaws.com/200204AGSA_report.pdf (Notes that the SCRA backlog is 40 326 cases and the RAB backlog is 147 794 cases, which would take 68 years to attend to without taking new cases). The basis for the latter calculation is the DHA Immigration Services' Asylum Seeker Management, 2018 Annual Report, which indicated that, in 2018, the RAB issued 844 decisions, of which 600 were referred to the RSDO. According to the MHA's Written Reply to Question no. 1767 (1 June 2018), there was only one RAB panel, consisting of three members. In turn, SCRA upheld 14 628 RSDO decisions in 2018; set aside 3 499; and referred 3 755. The DHA Report also noted that, in 2018, 18 354 arrivals had been registered as asylum-seekers, a drop from 24 174 registered in 2017 and 35 377 recorded in 2016. The MHA's Written Reply to Question no. 380 (26 July 2019) noted that 516 asylum-seekers with s 22 permits were waiting for an interview with an RSDO for between 30 and 90 days, whereas 2 503 were waiting for an interview for more than 90 days. The average waiting time was 30 days or less. The peak years for asylum applications were 2008 and 2009, when 207 206 and 223 324 applications were received, respectively. Since then, application numbers have steadily lower (see MHA's Written Reply to Question no. 1766 (1 June 2018)).
status, unable to obtain the security that other permits could offer even when their personal circumstances have changed.

The Court accepted Ahmed’s appeal. It recognised that ‘requiring an asylum seeker to return to their countries [sic] of origin, in order to apply, would, in all likelihood, require that the asylum seeker give up their asylum seeker permit’.117 However, given that the applicants did not challenge reg 9 (requiring applications for temporary or permanent residence permits to be made out of SA), the Court stopped short of ‘unilaterally mak[ing] a provision which differentiates asylum seekers from other applicants under the Immigration Act, by directing that the Department receive these applications from asylum seekers from within the borders of the country’.

Regrettably, the Court also refrained from relying on IRL tenets to cement the normative basis underlying the claim: asylum-seekers are qualitatively different than other migrants in that, as presumptive refugees, they cannot return to their countries of origin to lodge a permit application or otherwise. Indeed, as part III illustrates below, under s 5(1)(d) of the RA (as amended by the RAA 2017), were refugees to ‘visit’ their country of origin for any purpose, their refugee status could be withdrawn! Denying them, as asylum-seeker permit holders, access to rights that are attached to other immigration statuses and denying them the opportunity to apply for such statuses without losing their protection cuts against the IRL logic.

The Ahmed judgment also noted that, ‘[t]he Refugees Act protects both [refugees and asylum seekers] but their rights vary significantly’.118 The latter indeed seems to be the Executive’s premise. Yet courts ought to question it: as noted above, the RA explicitly grants certain rights to ‘refugees’; but if refugee status is declaratory, why should rights of asylum-seekers ‘vary significantly’ from those of recognised refugees?

It is argued that, ultimately, even those judgments that have protected asylum-seekers’ access to rights — most notably Watchenuka, Ahmed, and Ruta — have refrained from articulating the normative significance of asylum-seekers as ‘presumptive refugees’ and the ensuing IRL obligations. As part III demonstrates, the RAA 2017 explicitly rejects this premise: a stark differentiation between asylum-seekers and recognised refugees lies at its core, reversing judicially mandated prescriptions from which asylum-seekers have benefited until now. The RAA 2017 also overtly diverges from the spirit and the letter of IRL instruments, yet it does not ‘own’ or justify the decision to do so. Indeed, perhaps inadvertently, by dovetailing the coming into force of RAA 2008, which was legislated in a more protective era, the RAA 2017’s commencement has simultaneously adversely affected protection and enhanced the legal tools for prospective constitutional challenges thereto (explored in part IV).

Protracted asylum procedures may cause undue psychological distress and hinder asylum-seekers’ integration.


117 Ahmed (note 114 above) at para 59.

118 Ibid at para 24.
III THE REFUGEES AMENDMENT ACT 2017 AND INTERNATIONAL REFUGEE LAW

A The curious incident of the RAA 2017

On 12 December 2019, President Ramaphosa signed a proclamation stipulating that the RAA 2008 ‘shall come into force on 1 January 2020’.\(^{119}\) The much-delayed commencement of the RAA 2008\(^{120}\) triggered an immediate coming into force of the Refugees Amendment Act 12 of 2011 (RAA 2011) and of the RAA 2017.\(^{121}\) The new regulations, repealing the 2000 regulations, were also gazetted and came into force on 1 January 2020.

The RAA 2008 enacts s 1A of the RA and repeals s 6. Section 1A replicates s 6 save for one substantive change: substituting the phrase ‘with due regard to’ with ‘in a manner that is consistent with.’ As amended, the RA has to be ‘interpreted and applied ‘in a manner that is consistent with’ the 1951 Convention, the 1967 Protocol, the 1969 OAU Convention, the Universal Declaration of Human Rights, and ‘any domestic law or other relevant convention or international agreement to which the Republic is or becomes a party’. It can be argued that ‘with due regard’ is rather ambiguous, which perhaps partly explains why SA courts have rarely referenced it (for discussion see part II). In contradistinction, ‘in a manner consistent with’ is unequivocal and considerably stronger: it requires an appraisal of compatibility with the enumerated instruments in any case within the ambit of the RA.

Part IV will consider the constitutional (review) ramifications of the combined coming into effect of the RAA 2008 and the RAA 2017.\(^{122}\) This part explores key legislative changes brought about by the RAA 2017 affecting the livelihood of asylum-seekers in five main areas: exclusion from refugee status; access to asylum; asylum processing centres (APCs) and restrictions on movement; access to employment and education; and restrictions of political activities. Each of those changes alone, and especially taken together, represent significant backtracking from the commitment to IRL in the (unmodified) Preamble to the RA. Several changes appear to be direct responses to adverse judgments, notably Watchenuka and Limpopo (regarding access to employment and education) and Saidi (regarding asylum permits/visas). Others (re)open protection gaps which courts, utilising the Bill of Rights, sought to close.

While this article focuses on the status and rights of asylum-seekers, it would be remiss not to briefly highlight the two main detrimental effects of the RAA 2017 on status and

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\(^{119}\) The Proclamation was published on 27 December 2019 in Government Gazette No. 42932.

\(^{120}\) The lapse of time between legislation and implementation renders the justifiability of such measures particularly suspect. This was not the first instance in which the implementation of an Act was delayed, absent proclamation: no Presidential proclamation has ever been made under s 1(1) of the Application of Resolutions of the Security Council of the United Nations Act 172 of 1993. The (ab)use of the power to make proclamations raises interesting constitutional questions: see eg Ex Parte Minister of Safety and Security in re S v Walters [2002] ZACC 6, 2002 (4) SA 613 (CC) at paras 71–73(Holds that the President’s power to determine the date of coming into operation of an Act is a public power that must be exercised lawfully: it cannot be used to veto or otherwise block implementation).

\(^{121}\) RAA 2017 s 33 stipulates that it comes into operation immediately after the commencement of the RAA 2008 and the RAA 2011; RAA 2011 s 14 stipulates that it comes into operation immediately after the commencement of the RAA 2008; RAA 2008 s 34 states that it ‘comes into operation on a date determined by the President by proclamation in the Gazette’.

\(^{122}\) RAA 2011 enacts relatively minor changes which do not fundamentally challenge IRL. For completeness, the Refugees Amendment Act 10 of 2015 came into operation on 27 September 2015, allowing the media and the public access to RAB hearings.
rights of *recognised refugees* in SA and their incompatibility with the 1951 Convention. First, the legislation institutes new grounds for cessation of status (referred to as ‘withdrawal’), intensifying refugee precariousness. Second, it renders permanent residence and, consequently, naturalisation, far less attainable.

Under the 1951 Convention framework, once refugee status is granted, cessation can only take place in one or more of the circumstances enumerated in the six sub-clauses of art 1C which ‘are negative in character and are exhaustively enumerated’.

Now, the OAU Convention’s additional cessation clause (that a refugee ‘has seriously infringed the purposes and objectives of this Convention’) arguably raises an interpretive tension which is yet to be judicially resolved: with respect to the refugee definition, where the later, region-specific treaty is more protective, and hence should be followed by SA as party to both, under the OAU’s cessation clause circumstances may arise which mandate cessation of protection but not under the 1951 Convention.

This longstanding challenge notwithstanding, the RAA 2017 introduces new cessation clauses that are *not* articulated in either treaty, and revises enumerated cessation grounds in a manner that diverges from their meaning. It therefore entails withdrawal of refugee protection from persons who should continue to enjoy it under both the 1951 Convention and the OAU Convention. Four RAA 2017 stipulations are particularly concerning.

First, the Minister of Home Affairs is authorised to ‘cease the recognition of the refugee status of any individual refugee or category of refugees, or to revoke such status’. Whereas s 5(1)(e) of the RA has already provided for cessation of status where a change of circumstances related to the grounds for recognition had occurred (as per arts 1C(5–6) of the 1951 Convention), the new cessation ground provides no guidance as to the *additional* basis for a decision to cease status of individuals or indeed *en masse*.

Second, the RAA authorises cessation of status if a refugee merely ‘returns to visit’ that country. Section 5(1)(d) of the RA pre-RAA 2017 followed the 1951 Convention art 1C(4) stipulation that a refugee must have ‘voluntarily re-established’ themselves in the country which they left to meet that cessation ground. UHNCR’s longstanding position is that ‘refugees

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125 There is also no apparent regional practice that potentially alters the scope of IRL in the African region. For discussion see DJ Cantor & F Chikwanha ‘Reconsidering African Refugee Law’ (2019) 31(2–3) *International Journal of Refugee Law* 182. Cantor & Chikwanha also call for a ‘broader consideration of whether national refugee laws provide evidence of wider processes of custom formation in relation to other rules, particularly those that fall outside the terms of existing refugee treaties’. ‘Reconsidering African Refugee Law’ fn 378 page 245

126 RA (as amended) s 5(1)(h).

127 RA (as amended) s 5(1)(d). For example, see R Ziegler *Voting Rights of Refugees* (2017) ch 6 (re challenges arising in respect of refugee Out-of-Country Voting, including risk of premature cessation, as per arts 1C(1), (5) of the 1951 Convention).
should be able to make visits ‘to their country of origin to inform themselves of the situation there — without such visits automatically involving loss of refugee status’.\textsuperscript{128}

Third, the new regulations consider engagement with the country of origin’s consular authorities without prior permission of the Minister as a basis for withdrawal of refugee status — an unduly expansive interpretation of the art 1C(1) ‘re-availment’ of ‘protection’ clause. Moreover, this is a rather remarkable stipulation given that SA authorities often require refugees to provide birth or marriage certificates, which can only be issued to refugees by their country of nationality.\textsuperscript{129} Elsewhere,\textsuperscript{130} I cautioned against host countries’ reliance on contacts with country of origin officials to consider refugees as having ‘re-availed’ themselves of the ‘protection’ of their country, even though many refugees may fear the actions of non-state actors in their country of origin rather than state officials. Nevertheless, an explicit blanket legislative stipulation to that effect is a radical departure from global practice.

Fourth, and somewhat relatedly, the new regulations pronounce that any person who ‘stands for political office or votes in any election … of … country of nationality without the approval of the Minister’\textsuperscript{131} or ‘participates in any political campaign or activity related to … country of origin or nationality whilst in the Republic without the permission of the Minister’\textsuperscript{132} will have their refugee status withdrawn. Elsewhere,\textsuperscript{133} I warned against the possibility that host countries would consider participation in country of origin elections as ground for cessation, especially when done in-country but even when refugees vote remotely. The new stipulation goes much further, with the pre-authorisation requirement likely to have a chilling effect on refugees seeking to protest abuses in their country of origin including those which may have caused their flight.\textsuperscript{134}

By design, the RAA 2017 severs any ties that may remain between refugees and the political communities of their country of origin. It is therefore particularly unwelcome that it concomitantly doubles, from five to ten years, the residence requirement that must be satisfied before a recognised refugee can apply to have their status certified, a precursor to grant of permanent residence, which in turn is a precursor to naturalisation.\textsuperscript{135} This retrogressive approach is at odds with IRL: while art 34 of the 1951 Convention does not require naturalisation of refugees, asylum countries undertake to ‘as far as possible… facilitate the[ir] assimilation and naturalization’ and, at the very least, should certainly not be rendering naturalisation for refugees harder than for other migrants.\textsuperscript{136}

\textsuperscript{128} UNHCR ExCom Conclusion No. 18 (Voluntary Repatriation) (16 October 1980) para (e), available at https://www.unhcr.org/uk/excom/exconc/3ae68c6e8/voluntary-repatriation.html.

\textsuperscript{129} Regulations 4(1)(a–d) of the new Regulations.

\textsuperscript{130} Ziegler Voting Rights of Refugees (note 127 above) ch 7.

\textsuperscript{131} Regulation 4(1)(g) of the new Regulations.

\textsuperscript{132} Regulation 4(1)(i)) of the new Regulations.

\textsuperscript{133} Ziegler Voting Rights of Refugees (note 127 above) ch 6.

\textsuperscript{134} For discussion of permissible modes of political participation pre RAA 2017, see M Mpeiva ‘The Case of Congolese Refugees in South Africa’ in L Antara (ed) Political Participation of Refugees (2018).

\textsuperscript{135} Section 27(3) of the RA (as amended). Further to doubling the post-recognition residence period, the amended provision also mandates SCRA to consider ‘all the relevant factors and within a reasonable period of time, including efforts made to secure peace and stability in the refugee’s country of origin’ before it ‘certifies’ that the applicant ‘would remain a refugee indefinitely’.

\textsuperscript{136} For discussion see F Khan and R Ziegler ‘Refugee Naturalization and Integration: Where “Durable Solutions” meet Socio-Political Realities’ in Oxford Handbook of International Refugee Law (note 27 above).
In addition to the new restrictions on recognised refugees, part F appraises new prohibitions on political activities of asylum-seekers within South Africa. Consequently, recognised refugees are now restricted in their political engagement vis-à-vis their country of origin, on pain of cessation/withdrawal of status; prohibited from taking part in political activities related to SA; and have vanishingly small prospects of naturalising and consequently enjoying full membership of SA’s political community, including electoral participation.

In *Voting Rights of Refugees*, I argue that recognised refugees are a special category of non-citizen residents in need of (full) membership in a political community for an indeterminate, *ex ante* unknown, period of time; and that it is therefore desirable, *de lege ferenda*, that they be treated by their countries of asylum as if they were their citizens in respect of entitlements which, in international law, *may* be subject to a citizenship qualification — including electoral rights. Post-RAA 2017, South Africa offers an illustration of the political limbo in which refugees may find themselves in their countries of asylum. In Arendt’s terms, recognised refugees in SA are now deprived of ‘a place in the world which makes opinions significant and actions effective’.

**B Exclusion from refugee status**

Article 1F of the 1951 Convention defines three categories of persons to whom the 1951 Convention *shall not apply* due to the deplorable nature of acts that they have committed prior to admission to a country of asylum. Such exclusions pertain to underserving persons. In turn, Article 1E denies the application of 1951 Convention protections to a person ‘recognized by the competent authorities of the country in which he has taken residence as having the rights and obligations which are attached to the possession of the nationality of that country’. Article 1E exclusions thus apply to those deemed to enjoy elsewhere status superior to that of refugees.

RAA 2017 amends s 4(1)(d) of the RA to exclude any person who ‘enjoys the protection of any other country in which he or she is a *recognized refugee, resident or citizen*’ (emphasis added), adding ‘resident’ to the original RA articulation. The UNHCR *Handbook on Procedures* posits that ‘the [art 1E] exclusion operates if a person’s status is largely assimilated to that of a national of the country. In particular he must, like a national, be fully protected against deportation or expulsion.’ Yet *residence* (unlike permanent residence) does not generally offer such protection. In amending s 4(1)(d), the RAA 2017 is effectively following the White Paper in adopting a ‘safe first country of entry’ approach which substantively diverges from the emphasis put in Article 1E of the 1951 Convention on security of residence in a non-persecutory country as per its nationals being *sine qua non* for its application.

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137 Ziegler *Voting Rights of Refugees* (note 127 above) ch 8.
139 UNHCR *Handbook on Procedures* (note 39 above) at para 145.
141 Article 1E of the 1951 Convention excludes a person ‘recognized by the competent authorities of the country in which he has taken residence as having the rights and obligations which are attached to the possession of the nationality of that country.’
Within the 1951 Convention framework, the three art 1F exclusion clauses constitute an exhaustive list and, given their effect, must ‘always be interpreted in a restrictive manner’. In Africa, the OAU Convention’s additional exclusion clause, that a person ‘has been guilty of acts contrary to the purposes and principles of the Organization of African Unity’, raises similar interpretive questions to those discussed above regarding the additional clause concerning cessation of status. Sections 4(1)(a) (b), and (c) of the (pre-RAA 2017) RA include ‘exclusion’ clauses which broadly reproduce arts 1F(a), (b), and (c) of the 1951 Convention, the latter relating to acts against the ‘objects’ (akin to purposes) and ‘principles’ of both the UN Charter and the OAU Convention. Yet, similarly to its approach to cessation, the RAA 2017 introduces five new exclusion clauses which are not recognised by either the 1951 Convention or the OAU Convention. The effect of each of the five new clauses is to deny refugee status to persons who are ‘refugees’ within the meaning of art 1A(2) of the 1951 Convention and the OAU Convention. Taken together, they have profound effects on the scope of refugee protection in SA.

Given that unamended s 2 of the RA still protects excluded individuals from being deported or expelled to a country where they would be exposed to the risks stipulated in s 3, such persons could be left in indefinite legal limbo: no permit/visa either under the RA or the IA could be issued to regularise their sojourn in SA, so they would be protected from refoulement whilst left undocumented and subject to harassment, arrest, or indeterminate detention.

The new exclusion clauses are appraised below.

1 New section 4(1)(e): ‘has committed a crime in the Republic which is listed in Schedule 2 of the Criminal Law Amendment Act, 1997 (Act No. 105 of 1997), or which is punishable by imprisonment without the option of a fine’

_Gavric_ concerned the application of pre RAA 2017 s 4(1)(b) of the RA, pertaining to exclusion of persons who committed a crime ‘which is not of a political nature’. The provision resembled art 1F(b) of the 1951 Convention, the application of which is explicitly limited to ‘serious non-political’ crimes committed outside the country of refuge prior to admission to that country as a refugee. In contrast, individuals who commit a crime in the country of refuge should be subject to that country’s criminal law process. This, as the SCA noted in

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142 UNHCR Guidelines on International Protection No. 5: Application of the Exclusion Clauses: Article 1F of the 1951 Convention relating to the Status of Refugees HCP/GIP/03/05 (4 September 2003) at paras 2–3.
143 The OAU’S ‘purposes’ and ‘principles’ are outlined in the Charter of the Organization of African Unity, 25 May 1963, 479 United Nations Treaty Series 39, arts II & III. They bear considerable overlap with the purposes and principles of the UN in arts II & III of its Charter — which form the third ground for exclusion from status under Art 1F of the 1951 Convention.
144 Cantor & Chikwanha (note 125 above) fn 252 (Notes that, other than SA, only seven countries out of 46 African countries surveyed have added exclusion clauses to the enumerated list in the OAU Convention. Other than SA, only Tanzania and Zimbabwe exclude persons granted refugee status by another country — both exempting persons who arrive via a territory ‘where there has been a serious breach of peace’. Ibid fn 260).
145 _Gavric v Refugee Status Determination Officer_ [2018] ZACC 38, 2019 (1) SA 21 (CC) at para 50 (Considers an exclusion decision to be a substantive decision like a decision by an RSDO to reject an application which triggers review by SCRA, for manifestly unfounded, fraudulent and abusive applications, or an appeal to RAB for unfounded applications).
146 UNHCR Guidelines on International Protection (note 142 above) at paras 5, 16.
Ruta, is due to the exceptional nature of the exclusion provisions and the severe consequences of exclusion for an individual.\(^{147}\)

The RAA 2017 amends s 4(1)(b) of the RA to add the words ‘outside the Republic’, clarifying that provision’s application to the circumstances anticipated in art 1F(b). But it also adds a new provision, subsection (e), excluding from status any person who committed a crime \textit{in the Republic}, which is listed in Schedule 2 of the Criminal Law Amendment Act 105 of 1997), or which is punishable by imprisonment without the option of a fine. The modification of s 4(1)(b) magnifies the breach of IRL that is manifested by subsection (e): the 1951 Convention requires host countries to deal with criminal activities committed within their territories through their criminal law, rather than through exclusion from status. This is illustrated by the fact that host countries are permitted — under stringent conditions and subject to nonrefoulement — to expel refugees on grounds of ‘national security or public order’ (art 32 of the 1951 Convention). Adding insult to injury, it is not clear that Schedule 2 offences meet the ‘serious non-political crime’ test that would have to apply to offences committed outside SA. Indeed, it is even questionable whether the pre-amendment criterion (‘offence punishable by imprisonment without the option of a fine’) satisfies this standard.

In addition to the new exclusion ground, a similar provision was introduced as a new cessation ground, raising similar concerns.\(^{148}\)

2 New section 4(1)(f): has committed an offence in relation to the fraudulent possession, acquisition or presentation of a South African identity card, passport, travel document, temporary residence visa or permanent residence permit

Article 31 of the 1951 Convention, entitled ‘refugees unlawfully in the country of refuge’, recognises that, asylum-seekers are often forced to arrive at or enter a territory without prior authorisation. They may differ fundamentally from other migrants in that they may not be able to comply with the legal formalities for entry. For instance, they may not be able to obtain the necessary documentation in advance of their flight because of their fear of persecution and/or the urgency of their departure. The Court in \textit{Saidi} noted that ‘[s]uch is their [refugees’] desperation that they almost all enter the country where they seek refuge illegally and without any official documents’\(^{149}\) Signatories to the 1951 Convention therefore undertake in subsection (1) not to impose penalties for their ‘illegal entry or presence’ on ‘refugees’ who are ‘coming directly from a territory where their life or freedom was threatened’ provided they ‘present themselves without delay to the authorities’ and ‘show good cause for their illegal entry or presence’.\(^{150}\)

\(^{147}\) Ruta SCA (note 36 above) at para 65.

\(^{148}\) RA (as amended) s 5(1)(f).

\(^{149}\) Saidi (note 79 above) at para 71. Notably, under art 27 of the 1951 Convention, SA is required to issue identity papers to ‘any refugee in their territory who does not possess a valid travel document’.

\(^{150}\) The prevailing interpretation of art 31(1) is that its protections apply to persons who have briefly transited through other countries or who are unable to find effective protection in the first country or countries to which they flee; and that the requirement to present oneself ‘without delay’ must not be interpreted as a strict temporal requirement but rather depend on the refugee’s understanding of which authority they should report to and the availability of that authority. As for ‘good cause’, having a well-founded fear of persecution is in itself good cause for illegal entry. For broader discussion see e.g. G Noll ‘Article 31’ in A Zimmerman (note 123 above) ch 50; C Costello, Y Ioffe & T Büchsel \textit{Article 31 of the 1951 Convention Relating to the Status of Refugees} (2017).
Exclusion from refugee status, as per new subsection (f), due to fraudulent ‘possession, acquisition or presentation’ of an official document — assuming such document was used to secure entry into SA in order to seek asylum — constitutes wholesale denial of refugee protection to those who meet the 1951 Convention definition for actions they have undertaken for which they should not be penalised. The non-penalisation rationale stems from the declaratory nature of refugee status: lacking safe and legal routes to asylum in a host country, 1951 Convention refugees should not be penalised merely for seeking to obtain it by irregular means.

Again, a similar provision was introduced as a new cessation ground, raising similar challenges.

New exclusion subsection (g) raises both conceptual and practical challenges. The 1951 Convention ‘refugee’ definition, which the RA incorporated, refers to a person who has a well-founded fear of persecution for one or more of the five 1951 Convention reasons, including ‘membership of a particular social group’. There are many refugee-producing countries where a ‘recognisable judiciary’ (undefined term) is applying laws in other countries that are, for instance, persecutory towards LGBT+ persons. Article 1(xxii) of the RA defines ‘social group’ to include ‘among others, a group of persons of particular gender, sexual orientation, disability, class or caste’. The new provision could force the designation by South Africa of all countries where LGBT+ persons are persecuted as either not having a ‘recognisable judiciary’ or as countries where ‘the rule of law is [not] upheld’. Otherwise, it would undermine the fundamental premise of the RA by excluding persons fleeing such countries who are clearly in need of protection.

New exclusion subsection (h) requires the RSDO to determine whether an individual arrived at a Ports Of Entry fails to satisfy an RSDO that there are compelling reasons for doing so. In addition to applying to those arriving or securing entry through the use of false or falsified documents, the non-penalisation requirement in art 31 of the 1951 Convention also applies to those entering the country clandestinely. As per Asfaw, the purpose is ‘to protect refugees from the imposition of criminal penalties for breaches of the law reasonably or necessarily committed in the course of flight from persecution or threatened persecution’. Now, exclusion under the new provision can supposedly be avoided, provided that ‘compelling reasons’ are offered; yet such reasons are neither listed in the RAA 2017 nor in the new Regulations, leaving it to the RSDO’s discretion. The principled objection to exclusion as

151 RA (as amended) s 5(1)(g).
152 Re criminalisation, see https://www.humanitytrust.org/lgbt-the-law/map-of-criminalisation/.
154 R v Asfaw (UNHCR Intervening) [2008] 1 AC 1061 (Bingham LJ) at para 9.
155 Irrespective of other grounds for constitutional review discussed in part IV, this broad and undefined discretion would likely be found to be unconstitutional, based on the Dawood ratio. See Lawyers for Human Rights v Ministry of Home Affairs and Others [2017] ZACC 22, 2017 (5) SA 480 (CC) at paras 49–50.
a form of penalisation for breach of immigration law, articulated in the above discussion of s 4(f), applies here too.

Asylum-seekers arriving at a PoE, declaring their intent to apply for asylum, should receive an Asylum Transit Visa (ATV), issued pursuant to s 23 of the IA, for a period of five days (as per the 2011 IAA, which reduced its length from the previous 14 days). For persons entering not through a PoE and hence lacking an ATV, or who have not been issued an ATV, the new regulations effectively deny any opportunity to apply for asylum unless they are either permanent residents or citizens of a neighbouring country and can show ‘good cause’ for their ‘illegal entry’. The new regulations appear to conflate penalisation for illegal entry of persons who fail to meet the 1951 Convention art 31 tests, which is permissible, with their exclusion from protection, which is not.

5 New section 4(1)(i): has failed to report to the RRO within five days of entry into the Republic … in the absence of compelling reasons which may include hospitalisation, institutionalisation, on any other compelling reason provided that this provision shall not apply to a person who, while being in the Republic on a valid visa, other than a visa issued in terms of section 23 of the Immigration Act, applies for asylum

The ATV regime, described above, raises serious procedural concerns. Asylum-seekers must travel considerable distances to reach an RRO. When RROs devote only one day per week to applications of certain nationalities, the temporal limitation makes it more likely that irregular entry and non-reporting would render them undocumented. The new subsection (i) entails that, by missing an extremely narrow application window, presumptive refugees who have received an ATV upon entry will be excluded from status.

The new regulations refer to a ‘valid’ ATV as a pre-condition for an asylum application, unless a person is a ‘permanent resident or a citizen of a neighbouring country’: the reference to ‘compelling reasons’ in subsection (i) is not repeated in the new regulations. Recognising the category of refugees sur place, that is persons who have entered SA on a different visa and whose protection needs have arisen since, the new regulations nevertheless do not stipulate how such applications can be submitted — a challenge, given that an application must include a ‘proof of declaration of the intention to apply for asylum in the form of’ an ATV.

C Access to asylum and abandonment of applications

Section 22(1) of the RA (as amended) stipulates that ‘an asylum seeker whose application in terms of s 21(1) has not been adjudicated, is entitled to be issued with an asylum seeker visa, in the prescribed form, allowing the applicant to sojourn in the Republic temporarily, subject to such conditions as may be imposed, which are not in conflict with the Constitution or international law’ (emphasis added). The rhetorical commitment to avoid conflict with the Constitution or with ‘international law’ hits the provision’s substantive brick wall for two reasons. The first is the retrogressive denial of asylum-seekers’ access to employment and education (paragraph IIIE below). The second is the authorised withdrawal of visas in circumstances which

156 Reg 8(1)(c)(i) of the new Regulations.
158 Regulation 8(1)(c)(i) of the new Regulations.
held to be unconstitutional: s 22(5) authorises the Director-General ‘at any time prior to the expiry of an asylum seeker visa’ to ‘withdraw such visa … if (b) ‘the application for asylum has been found to be manifestly unfounded, abusive or fraudulent’ (c) ‘the application for asylum has been rejected’. In turn, the Director-General can, ‘subject to section 29, cause the holder [of a withdrawn asylum seeker visa] to be arrested and detained pending the finalisation of the application for asylum, in the manner and place determined by him or her with due regard to human dignity’. Taken together, an asylum-seeker visa may be withdrawn despite an application for asylum awaiting final determination by the SCRA, the RAB, or pending judicial review.

The RAA 2017 introduces the notion that an asylum application becomes abandoned one month after the expiry of an applicant’s visa, unless the applicant proves to SCRA that he or she was either institutionalised, entered into a Witness Protection Programme, was quarantined, or was arrested without bail. At the time of writing, the new provision will adversely impact persons particularly in the Western Cape due to the failure to properly implement the Scalabrini (II) court order (reopening the CTRRO) and the Nbaya court order (renewing permits originally issued in another RRO).

In turn, any asylum-seeker who is found to have abandoned his/her application will not be allowed to reapply and will be dealt with by an immigration officer in terms of the provisions of the IA. Given that the provision clearly applies to those whose applications are pending, the consequences are dire: should an asylum-seeker fail for any other reason to travel to a far-away RRO at regular intervals to renew their visa, they will be classified as an ‘illegal foreigner’ under the IA, and face risk of refoulement (only to be trumped by s 2 of the RA). Back to square one, then.

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159 Other grounds for withdrawal: (a) the applicant contravenes any condition endorsed on that visa; (d) the applicant is or becomes ineligible for asylum in terms of s 4 (exclusion) or s 5 (cessation).
160 RA (as amended) s 23.
161 See Reply to Question NW1292 to the Minister of Home Affairs (22 November 2019), available at https://pmg.org.za/committee-question/12750/(Notes that, in 2018, 3706 High Court review applications were registered; the equivalent 2017 figure is 2493). See also Reply to Question NW1970 to the Minister of Home Affairs (27 June 2018), available at https://pmg.org.za/committee-question/9306/(Notes that, in the years 2013–2018, there were 5 288 judicial reviews).
162 RA (as amended) s 22(12). As per s 22(13), an applicant whose application was abandoned cannot re-apply and must be dealt with as an illegal foreigner in terms of s 32 of the IA
163 The permissible conditions are stipulated in reg 11(10) of the new Regulations, yet it is not clear how an asylum-seeker is to present their case before SCRA.
164 Scalabrini v Minister of Home Affairs (submitted 24 March 2020) (WCHC) (papers with author) (challenging ss 22(12), (13) and reg 9 of the new Regulations).
165 RA (as amended) s 22(1); reg 9(3) of the new Regulations.
166 Additionally, asylum appeals must be lodged within ten working days, absent institutionalisation, entry into a witness protection programme, quarantine or arrest without bail. Regulation 14(1) of the new Regulations.
D  Asylum processing centres and restrictions on movement

The pre-RAA 2017 RA opted for a non-encampment policy,\(^{167}\) paving the way for local integration of asylum-seekers and refugees.\(^{168}\) The RAA 2017 arguably reverses this policy objective in respect of asylum-seekers by authorising the DHA Director-General to ‘require any category of asylum seeker to report to any particular or designated RRO, or other place specially designated as such, when lodging an application for asylum’ (emphasis added).\(^{169}\) It further stipulates that such designation may be made for specific countries of origin, geographical area, gender, nationality, political opinion, or social group.\(^{170}\) Article 3 of the 1951 Convention stipulates that the treaty shall apply to refugees ‘without discrimination as to race, religion, or country of origin’: discrimination between asylum-seekers based on county of origin would arguably \textit{prima facie} breach IRL.

The Minister of Home Affairs (MHA) 2017 White Paper revealed that SA is planning to build APCs near its borders with Zimbabwe and Mozambique ‘that will be used to profile and accommodate asylum seekers during their status determination process’.\(^{171}\) It anticipates that governmental departments and international organisations (including UNHCR and the ICRC) will operate there. The Paper proposes that ‘low risk’ (a term that it does not define) asylum-seekers may have the right to enter or leave the facility and be released into the care of national or international organisations and family or community members, who would have to provide assurances that basic services will be provided for.\(^{172}\)

The new regulations do not specify a time limit for enforced presence at the APCs. Meanwhile, they remove the time limits set in s 3(1) of the 2000 Regulations, which stipulated that an asylum claim will generally be ‘adjudicated’ within 180 days and that the first interview will take place within 30 days; and which set in place procedures to follow when applications remain in process after 180 days. Concomitantly, asylum-seekers will be deprived of the Watchenuka and Limpopo court-mandated access to employment and education, respectively (see part IIIE below) ‘since their basic needs will be catered for in the processing centres’. APCs may not be called detention centres, but their proposed \textit{modus operandi} conforms\(^{173}\). Indeed, as UNHCR argues, the key questions are whether an asylum-seeker is \textit{de facto} deprived of their

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\(^{167}\) J Crush, C Skinner, M Stugaitis ‘Benign Neglect or Active Destruction? A Critical Analysis of Refugee and Informal Sector Policy and practice in South Africa’ (2017) 3(2) African Human Mobility Review 751, 753. Note RA s 35 (reception and accommodation of asylum seekers in event of mass influx) which permits the MHA (2) ‘after consultation with the UNHCR representative and the Premier of the province concerned [to] designate areas, centres or places for the temporary reception and accommodation of asylum-seekers or refugees…’ This subsection was never activated. Regarding practices elsewhere in Africa cf Maple (note 72 above) App 1: Table 5 (‘Countries with Long Term Encampment Policies and FOM Restrictions in National Legislation’).

\(^{168}\) Hence, courts have not had to reconcile s 21(1) of the Bill of Rights, proclaiming that ‘everyone has the right to freedom of movement’ with s 21(3) thereof, which guarantees ‘every citizen…the right to enter, to remain in and to reside anywhere in the Republic’ (emphases added).

\(^{169}\) RA (as amended) s 21(c).

\(^{170}\) RA s 21(d).


\(^{172}\) Ibid.

\(^{173}\) Compare R Ziegler ‘No Asylum for “Infiltrators”: The Legal Predicament of Eritrean and Sudanese Nationals in Israel’ (2015) 29(2) \textit{Journal of Immigration, Asylum and Nationality Law} 172 (Appraises an Israeli High Court of Justice judgment quashing legislation that mandated the holding of persons in ‘residence centres’).
liberty (regardless of labels) and whether such deprivation is lawful according to international law.174

Asylum-seekers enjoy protection with respect to detention under both IRL and IHRL.175 The ICCPR stipulates that ‘everyone has the right to liberty and security of person’, and that ‘no one shall be subjected to arbitrary arrest or detention’. The Human Rights Committee (HRC) opined that restrictions pursuant to art 9 can be direct or indirect: for instance, providing a person with the necessities of life in only a specified location amounts to a restriction on freedom of movement and choice of residence.176 It accepted that ‘an asylum seeker may be detained for a brief initial period in order to document their entry, record their claims and determine their identity if it is in doubt. To detain them further while their claims are being resolved would be arbitrary in the absence of reasons specific to the individual, such as an individualized likelihood of absconding, a danger of crimes against others, or a risk of acts against national security.’177 The HRC further noted that detention ‘must … not be based on a mandatory rule for a broad category, must take into account less invasive means of achieving the same ends, such as reporting obligations, sureties or other conditions to prevent absconding, and must be subject to periodic re-evaluation and judicial review’.178 Hence, in order for restrictions of liberty of asylum-seekers to be lawful under the ICCPR, they must include substantive and procedural safeguards; the RAA 2017 clearly lacks both.179

In turn, the IRL treaty basis for restrictions on movement of asylum-seekers rests in art 31(2) of the 1951 Convention, which enjoins host countries from ‘apply[ing] to the movements of such refugees restrictions other than those which are necessary and such restrictions shall only be applied until their status in the country is regularized or they obtain admission into another country’. The ‘necessity’ test under art 31(2) is coterminous with the prohibition on ‘arbitrary’ detention in art 9 of the ICCPR, above. As for ‘regularization’, the better view is that its meaning is confined to lifting the unlawfulness of the illegal entry or presence of the refugee concerned, exchanging the unauthorised presence for an authorised one (in SA, arguably that translates to the issuance of a s 22 visa to an asylum-seeker), rather than a completed refugee


176 HRC General Comment No. 35: Article 9 (Liberty and Security of Person) (16 December 2014) at para 20.

177 Ibid at para 18.

178 Ibid.

179 Compare UN Working Group on Arbitrary Detention report regarding ‘transit zones’ set by Hungary on the Hungarian-Serbian border, noting that ‘there can be no doubt that holding migrants in these “transit zones” constitutes deprivation of liberty in accordance with international law’ (15 November 2018), available at https://bit.ly/2B7XSPu; but see the European Court of Human Rights’ Grand Chamber judgment in App No. 47287/15 Ilias and Ahmed v Hungary (21 November 2019), holding by a majority (Bianku, Vucinic JJ dissenting) that despite ‘significant restriction on their freedom of movement, [the restrictions] did not limit their liberty unnecessarily or to an extent or in a manner unconnected to the examination of their asylum claim’, in part due to the fact that, as stated at para 242, ‘the applicants spent only twenty-three days in the zone’.
status determination procedure.\textsuperscript{180} Once regularisation occurs, asylum-seekers should enjoy the protection of art 26 of the 1951 Convention, which requires a country of asylum to ‘accord to refugees lawfully in its territory the right to choose their place of residence to move freely within its territory, subject to any regulations applicable to aliens generally in the same circumstances.’\textsuperscript{181}

In October 2018, the Committee on Economic, Social, and Cultural Rights (CESCR) expressed concerns about ‘the proposal of establishment of asylum processing centres in border areas’ as well as ‘the reportedly large backlog of asylum applications pending in the appeal process’\textsuperscript{182} and urged South Africa to ‘[e]xpeditiously clear the backlog of asylum applications pending in the appeal process’.\textsuperscript{183} At the time of writing, no APC has been built, while the backlog remains.

E Access to employment and education

Part II demonstrated how courts have steadily chipped away at government policies attempting to restrict access of asylum-seekers to wage-earning employment, self-employment, and education, as well as sought to restrict their movement. The Green Paper on Immigration, which preceded the RAA 2017, posited that ‘the adoption of a policy of non-encampment that, coupled with non-provision of basic food and accommodation to “indigent asylum-seekers” has led courts to “obl[ig]ing the Department of Home Affairs to consider issuing deserving cases with permits allowing them to work or study” which “has become a powerful “pull factor” which further burdens the asylum system leading to many adjudication cases being delayed for years’.\textsuperscript{184} The government’s assessment therefore recognises that, judicially sanctioned access to employment came about first and foremost because asylum-seekers do not receive social assistance while their applications are appraised. The RAA 2017 ‘responds’ to the challenge both by paving the way for confining asylum-seekers to APCs (as per above) and by reversing the post Watchenuka and Limpopo default regarding asylum-seekers’ access to wage-earning employment, self-employment, and education.\textsuperscript{185}

Under the RAA 2017, asylum-seekers wishing to have their right to work ‘endorsed’ on their visa\textsuperscript{186} must satisfy an RSDO that they are unable to sustain themselves and their dependants.\textsuperscript{187} They ‘may be assessed’ (pursuant to undefined parameters) to determine their eligibility.\textsuperscript{188} Should they be successful in demonstrating that they cannot self-sustain, ‘they may be offered

\textsuperscript{180} HRC General Comment (note 176 above) at para 18.

\textsuperscript{181} In Scalabrini (II) (note 69 above), the SCA regarded restrictions on access to RROs (caused by the closure of the Cape Town RRO) as having an adverse effect on the right of ‘refugees lawfully in its territory’ to ‘choose their place of residence and move freely within the asylum country’s territory’ (but has not pronounced on IRL ramifications).


\textsuperscript{183} Ibid at para 26(a).

\textsuperscript{184} Green Paper (note 12 above) at para 12.

\textsuperscript{185} Reacting to the Green Paper, UNHCR noted that ‘the right to work is a fundamental human right, integral to human dignity and self-respect, and that reliance on assistance is not conducive to self-sufficiency’. B Jordan ‘Not in our name, UN body tells SA’, Sunday Times, 12 March 2017, available at https://www.pressreader.com/south-africa/sunday-times/20170312/281840053470410.

\textsuperscript{186} Regulation 11(4) of the new Regulations requires an RSDO interview and assessment to take place prior to the issuance of an endorsement.

\textsuperscript{187} RA (as amended) s 22(8)(a).

\textsuperscript{188} RA s 22(6).
shelter and basic necessities by the UNHCR or any other charitable organisation or person’.\textsuperscript{189}

Only if they cannot be provided for by such organisations or persons could they be potentially eligible for an endorsement of their right to work. Such endorsement would require them to produce a letter of employment within 14 days of taking up employment.\textsuperscript{190} It is an offence, punishable by up to R20 000 fine, to employ an asylum-seeker lacking an endorsement.\textsuperscript{191}

Finally, the DHA Director-General must revoke the endorsement if an employee is unable to prove that they are employed ‘after a period of six months from the date on which such right was endorsed.’\textsuperscript{192}

The scheme imposes extremely harsh procedural conditions on employing asylum-seekers (it contains no specific reference to self-employment). Since asylum-seekers are now required to make an application for asylum within five days of entry into the Republic, and since their dependants have to be declared as part of the application, an asylum-seeker has five days to communicate with friends and family and obtain confirmation of their support before they lodge their application. They are denied the right to work whilst the initial assessment takes place. Implicitly, they will not receive an employment endorsement until and unless they can offer proof of a negative — that they cannot receive assistance from UNHCR or other organisations. There could thus be lengthy periods during which asylum-seekers would neither be able to self-sustain nor rely on others (let alone the state) for support, potentially leaving them destitute. Yet, the (modest) Watchenuka ratio — that SA cannot deny asylum-seekers both welfare support and access to gainful employment — remains compelling. Indeed, in its Concluding Observations, CESCR expressed concerns ‘that the right of asylum-seekers to work has been denied through Section 22(8)’\textsuperscript{193} and called on South Africa to ‘[e]nsure, to the fullest extent possible, that asylum seekers can support themselves and enjoy the right to work, including by amending [it]’.\textsuperscript{194}

The above analysis demonstrates that the RAA 2017 clearly conflicts with previous courts’ judgments; but does it breach IRL? Article 17 of the 1951 Convention accords ‘refugees lawfully staying … the most favourable treatment accorded to nationals of a foreign country in the same circumstances, as regards the right to engage in wage-earning employment’. Article 18 accords ‘a refugee lawfully in their territory treatment as favourable as possible and, in any event, not less favourable than that accorded to aliens generally in the same circumstances, as regards the right to engage on his own account in agriculture, industry, handicrafts and commerce and to establish commercial and industrial companies’. Hence, IRL draws a temporal distinction between access to self-employment, which applies as soon as a refugee is ‘lawfully in’ the country, and access to wage-earning employment, which is only required once a refugee is ‘lawfully staying’.

It is contended that the relevant interpretive premise should be that of asylum-seekers as ‘presumptive refugees’ and of an asylum application rendering an asylum-seeker’s presence lawful. Even if SA had provided public relief to asylum-seekers, preventing their destitution, IRL would only permit time-limited restrictions on asylum-seekers’ access to wage-earning

\textsuperscript{189} RA s 22(8)(b).

\textsuperscript{190} RA ss 22(8)(c), 22(9). A similar endorsement procedure is envisaged for exercising the right to study at a ‘relevant educational institution’.

\textsuperscript{191} RA s 22(10).

\textsuperscript{192} RA s 22(11).

\textsuperscript{193} ICESCR (note 26 above) at para 25.

\textsuperscript{194} Ibid at para 26(c).
employment — whereas restrictions on self-employment are prima facie suspect.\textsuperscript{195} In *Union of Refugee Women* (discussed in part II), the majority rejected the argument that the relevant comparators for refugees and asylum-seekers in respect of access to wage-earning employment are favoured non-citizens (permanent residents),\textsuperscript{196} and hence rejected a constitutional claim based on unfair discrimination, even in respect of recognised refugees, let alone asylum-seekers. An IRL-focussed interpretation would have necessitated a different analysis.

The RAA 2017 excludes all asylum-seekers from all forms of self-employment and casual work, irrespective of whether they can self-sustain or rely on others. It also excludes all asylum-seekers who can either self-sustain or can be otherwise supported from wage-earning employment. These exclusions can last indefinitely, given the new regulations remove even the expectation of a timely assessment of asylum applications. Such blanket restrictions are arguably incompatible with IRL.

\textbf{F Restrictions of political activities}

Regulation 4(2) stipulates that ‘no refugee or asylum seeker may participate in any political activity or campaign in furtherance of any political party or political interests in the Republic’. The regulations do not define ‘political activity, ‘campaign’ or indeed ‘political interests’.

Whereas IRL is silent on political rights,\textsuperscript{197} IHRL is not: the ICCPR protects the rights of ‘everyone’\textsuperscript{198} to ‘freedom of expression’, of ‘peaceful assembly’, and to ‘freedom of association with others’.\textsuperscript{199} Concomitantly, signatories thereto are expected to prohibit ‘advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or

\textsuperscript{195} Compare Directive 2013/33/EU of the European Parliament and the Council of 26 June 2013 Laying Down Standards for the Reception of Applicants for International Protection (Recast) art 15 (‘Employment’) which requires EU member states to ‘ensure that applicants have access to the labour market no later than 9 months from the date when the application for international protection was lodged if a first instance decision by the competent authority has not been taken and the delay cannot be attributed to the applicant’. It also notes that: ‘Access to the labour market shall not be withdrawn during appeals procedures, where an appeal against a negative decision in a regular procedure has suspensive effect, until such time as a negative decision on the appeal is notified’. Importantly, the Directive requires member states to ‘ensure that material reception conditions are available to applicants when they make their application for international protection’ including ‘an adequate standard of living for applicants, which guarantees their subsistence and protects their physical and mental health’. Ibid art 17(2). For discussion, see A Edwards ‘Article 17’ in Zimmermann (note 123 above) ch 35 at para 34; A Edwards ‘Article 18’ in Zimmermann (note 123 above) ch 18 at para 10.

Compare GS Goodwin-Gill and J McAdam *The Refugee in International Law* (3rd Ed, 2007) 526 (Suggests that, to meet the ‘lawfully staying’ threshold, refugees ‘must show something more than mere lawful presence’, such as ‘permanent, indefinite or unrestricted or other residence status, recognition as a refugee, issue of a travel document, or grant of re-entry visa…any of these statuses will raise a strong presumption that the refugee should be lawfully staying in the contracting State, and it would then fall to the State to rebut the presumption by showing, for example, that the refugee was admitted for a limited time and purpose, or that he or she is in fact the responsibility of another State’).

\textsuperscript{196} Compare *Union of Refugee Women* (note 103 above) at para 61.

\textsuperscript{197} 1951 Convention art 5. See also Ziegler *Voting Rights of Refugees* (note 127 above) ch 2.

\textsuperscript{198} HRC General Comment No 31: The Nature of the General Legal Obligation Imposed on State Parties to the Covenant (Adopted on 29th March 2004) (2187th meeting) at para 3 (‘the enjoyment of Covenant rights is not limited to citizens of States Parties but must also be available to all individuals, regardless of nationality or statelessness, such as asylum seekers, refugees, migrant workers and other persons, who may find themselves in the territory or subject to the jurisdiction of the State Party’).

\textsuperscript{199} Articles 19, 21, and 22 of the ICCPR, respectively.
violence’ as well as ‘propaganda for war’.\textsuperscript{200} Therefore, in IHRL, asylum-seekers and refugees \textit{qua} persons within SA’s territory and subject to its jurisdiction should enjoy ‘political communication’ rights there.

In turn, the prohibition on ‘subversive activities’ in the OAU Convention\textsuperscript{201} and the African Charter on Human and People’s Rights\textsuperscript{202} should be interpreted harmoniously with the ICCPR to denote ‘the overthrow of the legal, political and social order of the state which another state attempts or achieves by propagating its ideology amongst the political forces of the state which is the target of this undertaking’.\textsuperscript{203}

The Constitution protects political communication rights of ‘everyone’, and restrictions are subject to the general (s 36) limitation clause. The enumerated rights are: ‘freedom of expression’ including ‘freedom to receive or impart information or ideas’;\textsuperscript{204} the right to ‘peacefully and unarmed, to assemble, to demonstrate, to picket and to present petitions’;\textsuperscript{205} and the right to ‘freedom of association’\textsuperscript{206} Broadly consistent with the ICCPR, the scope of freedom of expression does not extend to ‘propaganda for war’, ‘incitement of imminent violence’, or ‘advocacy of hatred that is based on race, ethnicity, gender, or religion, and that constitutes incitement to cause harm’.\textsuperscript{207}

Meanwhile, \textit{citizens} are guaranteed the right to vote in the Republic’s elections\textsuperscript{208} as well as the right ‘to form a political party’, ‘to participate in the activities of, or recruit members for, a political party’ and ‘to campaign for a political party or cause’.\textsuperscript{209} There is arguably an overlap between elements of ss 16–18 and of s 19: the ‘furtherance of a political interest or cause’ as per s 19(1) would often be pursued as part of the individual’s freedom to ‘impart information or ideas’ and may involve assemblies, demonstrations, and petitions, oftentimes exercising freedom of association. Therefore, it is argued that the reference in s 19 to ‘citizens’ should not be read to restrict non-citizens’ political communication rights, but rather to elucidate a holistic account of the self-governance rights that citizens enjoy in the Republic.\textsuperscript{210}

SA courts have consistently held that the ‘bounds of the constitutional guarantee of free expression’ should be interpreted generously,\textsuperscript{211} given that ‘individuals in our society need to

\textsuperscript{200} Ibid art 20.
\textsuperscript{201} Article 3 of the OAU Convention requires ‘every refugee’ to ‘abstain from any subversive activities against any Member State of the OAU’ and Signatory States ‘to prohibit refugees residing in their respective territories from attacking any State Member of the OAU, by any activity likely to cause tension between Member States, and in particular by use of arms, through the press, or by radio.’
\textsuperscript{202} Ibid art 23(2)(a) notes that ‘any individual enjoying the right of asylum … shall not engage in subversive activities against his country of origin or any other State Party to the present Charter; and that (b) their territories shall not be used as bases for subversive or terrorist activities against the people of any other State Party to the present Charter.’
\textsuperscript{203} Sharpe (note 6 above) at 82 (referencing E Mbaya ‘Political Asylum in the Charter of the OAU: Pretensions and Reality’ (1987) 35 \textit{Law \\& State} 63, 74–75).
\textsuperscript{204} Constitution s 16(1).
\textsuperscript{205} Ibid s 17.
\textsuperscript{206} Ibid s 18.
\textsuperscript{207} Ibid s 16(2).
\textsuperscript{208} Ibid s 19(3)(a).
\textsuperscript{209} Ibid ss 19(1)(a) (b), and (c) respectively.
\textsuperscript{210} SA courts appear not to have directly addressed this interpretive question.
\textsuperscript{211} \textit{Laugh It Off Promotions v South African Breweries International} (27 May 2005) at para 47. See also \textit{Masuku v South African Human Rights Commission} [2018] ZASCA 180; 2019 (2) SA 194 (SCA); [2019] 1 All SA 608
be able to hear, form and express opinions and views freely on a wide range of matters. The Court quashed a provision prohibiting broadcasting of ‘material which is indecent or obscene or offensive to public morals or offensive to the religious convictions or feelings of any section of a population or likely to prejudice the safety of the State or the public order or relations between sections of the population’, holding that the provision ‘self-evidently limited the right to freedom of expression’. In Garvas, the Court held that ‘the right to freedom of assembly … exists primarily to give a voice to the powerless. This includes groups who do not have ‘political or economic power, and other vulnerable persons … this right will, in many cases, be the only mechanism available to them to express their legitimate concerns’. In Mlungwana, the Court emphasised that the term ‘everyone’ … ‘must be interpreted to include every person or group of persons’.

Pursuant both to SA’s international law obligations and to its Bill of Rights provisions, the rights that reg.4(2) restricts should be enjoyed by everyone in SA, including asylum-seekers and refugees. Elsewhere, I argue that, given their political predicament, asylum-seekers and refugees have a particularly strong claim to enjoy ‘political communication’ rights in their host country. Constitutionally, any restriction on ss 16–18 rights must clear the s 36 limitation clause hurdle — requiring a law of general application that is reasonable and justifiable in an ‘open and democratic society based on human dignity, equality, and freedom’. That reg 4(2) singles out asylum-seekers and refugees for adverse treatment (other non-citizens are spared), curtailing their autonomy and undermining their self-respect and dignity, may also give rise to a s 9 unfair discrimination claim.

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212 South African National Defence Union v Minister of Defence 1999 (6) BCLR 615 (CC); 1999 (4) SA 469 (CC) at para 7.
217 Constitution s 9(3): ‘the state may not unfairly discriminate directly or indirectly against anyone on one or more grounds including…’ For the equality clause tests see Harksen v Lane [1997] ZACC 12; 1998 (1) SA 300 (CC). The list of grounds is non-exhaustive: whereas nationality/citizenship is not included, it can still form the basis of an unfair discrimination claim. See e.g. Khosa v Minister of Social Development [2004] ZACC 11; 2004 (6) SA 505; 2004 (6) BCLR 569 (CC) (4 March 2004) at para 71(Finds exclusions of permanent residence from social welfare scheme to constitute unfair discrimination; the Court noted that acquisition of citizenship is subject to ministerial discretion and is, at least temporarily, a characteristic of personhood not alterable by conscious action and in some cases not alterable except on the basis of unacceptable costs). See also Larby-odam v Minister of the Executive Council for Education (North-West Province) [1997] ZACC 16; 1997 (12) BCLR 1655; 1998 (1) SA 745 (26 November 1997) at para 24(Holds that denying permanent employment opportunities to permanent residents, who ‘can be said to have made a conscious commitment to South Africa’ constitutes unfair discrimination). For criteria for determining unfair discrimination on an unlisted ground see Hoffman v South African Airways [2000] ZACC 17; 2001 (1) SA 1 (CC).
IV PROSPECTIVE CONSTITUTIONAL CHALLENGES

Part III appraised the adverse effects of the RAA 2017 and its regulations on access to the SA asylum system and to substantive rights. It demonstrated that the impugned legislation, which defies judicial pronouncements, breaches SA’s treaty obligations.

This part briefly outlines three potential grounds (to the non-exclusion of others) for mounting constitutional challenges against the RAA 2017. First, the RAA 2017 renders the amended RA internally inconsistent. The amendments brought about by the RAA 2017 breach IRL and IHRL treaty norms, yet the amended RA explicitly requires its interpretation to be consistent with such norms. Hence, by enacting the RAA 2017, Parliament acted irrationally and therefore unlawfully. Second, by restricting access to the asylum system and by denying asylum-seekers substantive rights they currently enjoy, the RAA 2017 violates their constitutional rights to, inter alia, just administrative action;\(^218\) freedom and security of the person;\(^219\) freedom of movement and residence;\(^220\) education;\(^221\) social security;\(^222\) freedom of expression, demonstration, picket, and petition, and association;\(^223\) as well as equality\(^224\) and human dignity.\(^225\) Third, the RAA 2017 is manifestly retrogressive and may therefore breach the state’s s 7(2) constitutional obligations to ‘respect, protect, promote and fulfil’ the Bill of Rights, interpreted in the light of the non-regression principle.

Section 172(1)(a) of the Constitution stipulates that any court must declare that any law or conduct that is inconsistent with the Constitution is invalid to the extent of its inconsistency. It is hoped that, courts will utilise IRL in their appraisal and declare relevant provisions unconstitutional.

A Legislative inconsistency, rationality, and the principle of legality

The simultaneous commencement of the RAA 2008 and RAA 2017 modifies both the substantive norms and the interpretive framework for appraisal of the amended RA — pulling in opposite directions. Prior to the RAA 2017, s 6 of the RA instructed SA courts to interpret and give effect thereto ‘with due regard’ to enumerated instruments to which the Republic has become a party. This necessitated ‘serious consideration’ both of IRL instruments and of IHRL instruments, especially where it supplements IRL such as in respect of political communication rights. Part II demonstrated that such ‘serious consideration’ was generally absent hitherto from the Republic’s asylum jurisprudence. RAA 2008 replaced s 6 with s 1A: courts now must interpret and give effect to the RA ‘in a manner consistent with’ SA’s IRL & IHRL obligations

\(^{218}\) Constitution s 33 (‘everyone has a right to administrative action that is lawful, reasonable and procedurally fair’) and s 3(1) of the Promotion of Administrative Justice Act 2000 (‘administrative action which materially and adversely affects the rights or legitimate expectations of any person must be procedurally fair’).

\(^{219}\) Constitution s 12(1) (‘everyone has the right to freedom and security of the person, which includes the right (a) not to be deprived of freedom arbitrarily or without just cause’).

\(^{220}\) Ibid s 21(1) (‘everyone has the right to freedom of movement’).

\(^{221}\) Ibid s 29(1) (‘everyone has the right to (a) a basic education, including adult basic education; (b) further education, which the state, through reasonable measures, must make progressively available and accessible’).

\(^{222}\) Ibid s 27(1)(c) (‘everyone has the right to have access to…social security, including, if they are unable to support themselves and their dependants, appropriate social assistance’).

\(^{223}\) Ibid ss 16–18 (text cited in part IIIIF).

\(^{224}\) Ibid s 9 (text cited in part IIIIF).

\(^{225}\) Ibid s 10 (text cited in part IIC).
— which must therefore become the starting point for appraisal of the amended RA and of its new Regulations.

Yet, as this article has shown, parts of the amended RA cannot be interpreted in a manner that is consistent with IRL. For instance, each of the five additional exclusion clauses entails denial of refugee status to those who qualify as ‘refugees’ in IRL as defined in s 3 of the RA (refugee status). There is therefore a direct and irreconcilable conflict between s 4 of the RA (exclusion) and s 2 (nonrefoulement): a person who meets the s 3 refugee definition would be excluded from refugee status pursuant to s 4, but SA authorities would still be enjoined from expelling, extraditing or returning them to any country, given that s 2 applies ‘notwithstanding any provision of this Act or any other law to the contrary’. The inevitable outcome is having in SA excluded but non-removable persons whose legal status and rights are in limbo for an indefinite period.

The Court held that ‘the exercise of public power by the Executive and other functionaries’ must be ‘rationally related to the purpose for which the power was given, otherwise they are in effect arbitrary’. The RAA 2017 renders the RA internally inconsistent, forces the Executive to act irrationally, and is therefore at odds with the constitutional principle of legality.

B Substantive breaches of the Bill of Rights: beyond dignity

Section 7(2) of the Bill of Rights requires the state to ‘respect, protect, promote and fulfil the rights in the Bill of Rights’. As the Glenister judgment postulated, the binding nature of international law obligations on the Republic is most significant when interpreting the obligations under s 7(2). Implicit in it is the obligation that the steps taken to protect and fulfil constitutional rights must be reasonable. Section 8(1) postulates that the Bill of Rights ‘applies to all law, and binds the legislature, the executive, the judiciary and all organs of state’. Parliament is not only obliged to refrain from interfering with fundamental rights but must give effect to them by positive action.

Section 36 of the Bill of Rights stipulates that rights ‘may be limited only in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom’. Relatedly, s 39(2) of the Bill of Rights requires courts interpreting any legislation to ‘promote the spirit, purport and objects of the Bill of Rights’ which are set out in s 7(1) — the democratic values of human dignity, equality and freedom.

The changes to the asylum regime outlined in part III violate substantive rights that asylum-seekers enjoy, not just under IRL but also (as part II has shown), pursuant to judicial precedents under the Constitution (invoking the constitutional right to dignity). Whereas the fact that legislation violates IRL does not definitively settle the constitutional question, that is, whether

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226 Pharmaceutical Manufacturers Association of South Africa & Another In re Ex Parte President of the Republic of South Africa [2000] ZACC 1, 2000 (2) SA 674 (CC) at para 79.


228 In Fedsure, the Court noted that ‘the principle of legality is necessarily implicit in the Constitution’. Fedsure Life Assurance Ltd & Others v Greater Johannesburg Transitional Metropolitan Council [1998] ZACC 17, 1999 (1) SA 374 (CC) at para 59.

229 Ibid at para 194.
the infringement of enumerated rights in the Bill of Rights is reasonable and justifiable, it provides a strong indication of the likelihood of that conclusion being reached in the appraisal.

C Non-regression

The principle of non-regression in international law mandates that, once a country has acted to realise a right, it must at the least maintain the achieved standard of protection henceforth. As Sanya Samtani argues, while the Court in Law Society does not explicitly articulate a principle of non-retrogression (or non-regression) in SA law, it offered an account of what its application looks like in practice.\(^{230}\) For instance, in relation to the state’s obligation under s 7(2) of the Bill of Rights, ‘[t]he President’s power in terms of section 231(1) is permissibly exercisable only insofar as it is aimed at protecting, promoting, respecting and fulfilling the rights in the Bill of Rights … [t]here is just no room for deviation, particularly where citizens’ existing rights are likely to be undermined or extinguished at any level where they used to be enjoyed.’\(^{231}\) The judgment also holds that ‘it is constitutionally impermissible, as long as our Constitution and the Treaty remain unchanged, for the President to align herself with and sign a regressive international agreement that seeks to take away the citizens’ right of access to justice at SADC level’.\(^{232}\) The RAA 2017 is manifestly retrogressive: it excludes ‘refugees’ within the meaning of the 1951 and OAU Conventions from receiving refugee status in SA; it renders abandoned asylum claims which under the existing protection regime would be assessed; it facilitates the establishment of APCs, de facto detention centres, whilst removing statutory times for assessing asylum claims; it denies asylum-seekers rights that they currently enjoy in respect of access to employment and education;\(^{233}\) it imposes new restrictions on political activities of both asylum-seekers and refugees; and it renders refugee status, once granted, subject to additional cessation clauses and, hence, more precarious, and refugee integration significantly less likely. Each of these changes reflects a weakening of SA’s commitment to refugee protection. Taken together, they amount to a sea change in its asylum regime.

V CONCLUDING REMARKS

Ratification and domestication of IRL treaties is a necessary but insufficient condition for ensuring effective refugee protection. Judiciaries must be able and willing to appraise legislation and executive actions to determine their compatibility with international standards. In some jurisdictions, the role of international norms in domestic constitutional arrangements is the source of ongoing contention: not so in SA, where an ‘international law friendly’ constitution


\(^{231}\) Law Society (note 17 above) at para 78.

\(^{232}\) Ibid at para 82.

requires courts to consider international law in interpreting the Bill of Rights and to adopt reasonable interpretations that are compatible with international law whenever they interpret legislation. Enter refugee protection, where the legislation domesticating SA’s international obligations has hitherto mandated interpretive ‘due regard’ to IRL and international human rights instruments.

In their jurisprudence, courts have generally resisted the Executive’s repeated efforts to frustrate asylum-seekers’ rights, finding them to be against the spirit and the letter of the RA. Their judgments acknowledge that, without effective access to rights and absent welfare support, asylum-seekers will be destitute, which would violate their constitutional right to human dignity. Over the past two decades, courts have attempted to bridge the gap between designation of persons as ‘illegal foreigners’ under the IA and the protection from refoulement that they enjoy under the RA. Yet, I have shown in this article that SA courts have under-utilised IRL norms, rarely articulating an IRL rationale for their judgments. Crucially, they have not challenged the normatively flawed core premise of (many) Executive policies: namely that, in its eyes, despite the express language of s 1(v) of the RA, refugee status is constitutive of rights, rather than declaratory.

The RAA 2017 forces a direct clash between the promise of the RA and its (amended) legal reality. Coupled with the RAA 2008 induced requirement, pursuant to s 1A, to interpret and give effect to the RA ‘in a manner consistent with’ IRL, courts will soon be called upon to pronounce on overt breaches of IRL in primary and secondary legislation that cannot be reconciled with the SA’s international obligations. The time is ripe.
No Return to Persecution or Danger: Judicial Application of the Principle of Non-Refoulement in Refugee Law in South Africa and Malawi

REDSON EDWARD KAPINDU

ABSTRACT: Refugeehood is premised on the ethical principle of surrogate protection. Where there is failure by a state to ensure the minimal levels of human rights protection for its citizens, either through inability or unwillingness, the social compact between the state and its citizen gets ruptured. Such rupture triggers the international duty of surrogate protection. The principle of non-refoulement is a core principle of international law that is premised on the principle of surrogate protection. An exploration of South African refugee law jurisprudence, exemplified most recently by the decisions in Ruta and Saidi, shows that the courts, including the Constitutional Court, are giving the principle of non-refoulement due recognition. Significant challenges, however, remain in practice. There has been some executive resistance against progressive rights-based refugee law jurisprudence. Corrupt practices also create an impediment to the realisation of refugee rights. In Malawi, by comparison, refugee law jurisprudence is sparse, and whilst there has been evidence of judicial progressiveness, such as in the Abdihaji case, there have also been other decisions, such as Kambiningi, where courts have shown lack of familiarity with or appreciation of the principle of non-refoulement. The legislative framework in Malawi also fails to sufficiently guarantee non-refoulement. The position in Malawi is mirrored in most Southern African states. The article critically examines the decisions in Ruta, Saidi and Abdihaji. Importantly, it makes recommendations for reform in the refugee law regimes in Malawi and other Southern African states drawing on the experiences from Ruta and Saidi.

KEYWORDS: asylum, minimal legitimacy, refugee status determination, return, surrogate protection

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I INTRODUCTION

Refugees face four major challenges once they have successfully left their country of origin or habitual residence (the source country). The first major challenge is access to entry into a state (the host state) where they may have refuge from serious harm or the threat of harm. Once granted access into the host state, the second challenge is how to safeguard their right not to be returned, expelled or otherwise sent to a jurisdiction where they are likely to suffer persecution or other forms of serious harm. The safeguard against such return, expulsion or sending is referred to as non-refoulement under international law.\(^1\) The third challenge is to convince authorities of the host state that they are, in fact, entitled to recognition of their refugee status and to be granted official refugee status.\(^2\) The fourth challenge is to access a comprehensive spectrum of rights necessary to ensure a life of dignity in the host state.

Under the 1951 International Convention Relating to the Status of Refugees (the 1951 Convention), a refugee is defined as any person who, owing to a well-founded fear of persecution for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his or her nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country.\(^3\) The 1969 OAU Convention Governing the Specific Aspects of Refugee Problems in Africa (the 1969 OAU Convention) adopted the refugee definition under the 1951 Convention. However, the 1969 OAU Convention extends the definition of a refugee to every person who, owing to external aggression, occupation, foreign domination or events seriously disturbing public order in his or her country of origin or nationality, is compelled to seek refuge in another country.\(^4\) These definitions have been adopted in many African countries including South Africa\(^5\) and Malawi.\(^6\)

The essence of refugee protection lies in authorities in host states ensuring state protection for all persons who are refugees by definition.\(^7\) The granting of refugee status entails the formal recognition of an asylum seeker as a person deserving of and entitled to surrogate state protection by the host state. An asylum seeker is essentially a person who is seeking to be recognised as a refugee in the host state.\(^8\) The process through which an asylum seeker’s claims are assessed in order to establish whether or not he or she should be formally recognised as a refugee is called refugee status determination (RSD). RSD is merely declaratory and the fact that a refugee has not been declared as such through the RSD process does not take away the right of non-refoulement. However, the RSD process remains crucial because a positive RSD outcome, in practice, provides greater assurance and guarantee that he or she will not be sent back to a state where he or she has a well-founded fear of persecution or serious harm. As Mireku has observed, ‘refusal of a refugee status may result in the expulsion of the refugee to a


\(^{3}\) Article I(A)(2).


\(^{5}\) South African Refugees Act 130 of 1998 s 3.

\(^{6}\) Malawian Refugees Act of 1989 s 2.

\(^{7}\) States are called upon to adopt more liberal and expansive interpretations of the term ‘refugee’. Andrew Shacknove for instance has stated that ‘[a]n overly narrow conception of “refugee” will contribute to the denial of international protection to countless people in dire circumstances whose claim to assistance is impeccable.’ A Shacknove ‘Who Is a Refugee?’ (1985) 95(2) *Ethics* 274, 276.

jurisdiction where he or she is likely to face [the] death penalty...or to be subjected to torture or any other cruel, degrading, or inhuman punishment.9

The significance of RSD has been emphasised by the UNHCR which has stated that, although the principle of non-refoulement is universally recognised, the risk of non-refoulement could only be avoided in earnest if the state concerned has accepted a formal legal obligation to protect the refugee.10 Indeed, the UNHCR has stated that the most essential component of refugee status determination is the protection against return to a country where a person has reason to fear persecution.11 Albie Sachs argues that when one considers the various obligations that the 1951 Convention imposes on state parties in respect of refugees, the principle of non-refoulement, when taken together with the other obligations, presents a coherent and enforceable legal regime for refugees that is markedly more favourable than the discretionary regime generally applicable to immigrants.12 Kneebone is therefore right in asserting that the right to seek asylum and the right against refoulement are the twin key precepts of refugee protection.13

This paper examines two decisions of the Constitutional Court of South Africa: *Ruta v Minister of Home Affairs*14 and *Saidi and Others v Minister of Home Affairs and Others*.15 In *Ruta*, the Court determined that prospective asylum seekers in South Africa are entitled to apply for asylum at any time that they might wish, even if they may delay in making such an application. In *Saidi*, the Court held that a Refugee Reception Officer (RRO) has the power to extend the permit issued under s 22(1) of the Refugees Act 130 of 1998 (South African Refugees Act) pending finalisation of judicial review proceedings under the Promotion of Administrative Justice Act 3 of 2000 (PAJA), in respect of a decision made in terms of the South African Refugees Act refusing an application for asylum made under s 21(1) of the South African Refugees Act. The Court further held that, pending finalisation of the review proceedings, an RRO is obliged to extend the permit of the asylum seeker concerned. This paper interrogates the correctness of these decisions and, in particular, explores their application and exposition of the principle of non-refoulement.

The paper explores the core principle of non-refoulement in international refugee law, locating the place that this principle has occupied under South African and Malawian domestic law; and draws some parallels between the two jurisdictions in this regard. The paper proceeds to discuss the relationship between the RSD process and the principle of non-refoulement. It explores how such a relationship has been reflected in South African jurisprudence, with reference to the decisions in *Ruta* and *Saidi*. The paper concludes by making appropriate

10 United Nations High Commissioner for Refugees (UNHCR) Note on Non-Refoulement (Submitted by the High Commissioner) Note on Non-Refoulement (Submitted by the High Commissioner) EC/SCP/2, 1977 para 18.
11 Ibid at para. 1. This view is shared by various scholars. Matthew Lister, for instance, has stated that the host state’s duty of non-refoulement ‘provides an important core of what states owe to refugees.’ M Lister, ‘Who are Refugees?’ (2013) 32(5) Law and Philosophy 645, 648.
14 [2018] ZACC 52; 2019 (2) SA 329 (CC).
recommendations for better refugee protection by strengthening measures to ensure greater adherence to the principle of non-refoulement in South Africa and Malawi.

II THE JUSTIFICATION FOR INTERNATIONAL REFUGEE PROTECTION

Refugeehood is said to result from the negation of the principles and ideals which define the relationship of rights and obligations between the subject and the state. Nathwani argues that refugee law is dependent on a theory of what he describes as a minimally legitimate state.\(^{16}\) He describes the minimally legitimate state as one that falls short of ensuring the minimal threshold beneath which the compact between the state and the citizen, for reciprocal rights and obligations, becomes effectively repudiated. In such a situation, Nathwani argues that the state loses its legitimacy as a protector of the citizen.\(^{17}\) He further states that international human rights norms provide the standard of the minimally legitimate state. Shacknove’s analysis brings better clarity to what a minimally legitimate state entails. He states that citizens are entitled to expect that their government will, at a minimum, guarantee physical security, vital subsistence, and liberty of political participation and physical movement and, in exchange, the citizens pledge their allegiance to the state.\(^{18}\) Shacknove argues that:

> No reasonable person would be satisfied with less. Beneath this threshold the social compact has no meaning. Thus, refugees must be persons whose home state has failed to secure their basic needs. There is no justification for granting refugee status to individuals who do not suffer from the absence of one or more of these needs. Nor is there reason for denying refugee status to those who do. Moreover, because all of these needs are equally essential for survival, the violation of each constitutes an equally valid claim to refugeehood.\(^{19}\)

Where such a social compact is broken, Rawls provides us with a morally and politically defensible set of principles of justice that trigger an international obligation to provide surrogate state protection for refugees. Rawls, in his work *The Law of Peoples*,\(^{20}\) draws upon Brierly\(^{21}\) and outlines a non-exhaustive list of familiar and traditional principles of justice among free and democratic peoples,\(^{22}\) which include that peoples are to ‘honour human rights’, and that ‘peoples have a duty to assist other peoples living under unfavourable conditions that prevent their having a just or decent political and social regime.’\(^{23}\) These two postulations by Rawls in

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17  Ibid.
18  A Shacknove ‘Who is a Refugee?’ (1985) 95(2) *Ethics* 274.
19  Ibid at 281.
22  This non-exhaustive list of principles of justice, according to Rawls (note 20 above) at 37, is as follows:
   (a) Peoples are free and independent, and their freedom and independence are to be respected by other peoples.
   (b) Peoples are to observe treaties and undertakings.
   (c) Peoples are equal and are parties to the agreements that bind them.
   (d) Peoples are to observe a duty of non-intervention.
   (e) Peoples have the right of self-defense but no right to instigate war for reasons other than self-defense.
   (f) Peoples are to honor human rights.
   (g) Peoples are to observe certain specified restrictions in the conduct of war. Peoples have a duty to assist other peoples living under unfavourable conditions that prevent their having a just or decent political and social regime.
23  Rawls (note 20 above).
the *Law of Peoples* provide a sound moral and political grounding for international surrogate protection to persons fleeing from countries that fail the minimal legitimacy test.

Sarker critiques Rawls’ thesis, arguing that ‘Matters of global justice require an inclusive approach, which is probably lacking in Rawls’ *Law of Peoples*’ and that ‘refugees and stateless persons have little to gain from the formulated principles’. However, the critique seems to miss the point. As pointed out above, the Rawlsian typology of principles of global justice outlined in the *Law of Peoples* is useful in understanding the international basis and justification for refugee protection. This is an understanding that such protection is premised on the principle of surrogacy. Democratic and well-ordered societies (peoples) are under a duty to honour human rights and to help other peoples living under harsh and unfavourable conditions so that such peoples may flourish and live a dignified life in society. It is this duty that provides moral and political justification for the principle of *non-refoulement*. In order for the obligation of international surrogate protection to be triggered, the harsh and unfavourable conditions should be heightened to such a degree of hostility, denial, deprivation, or failure that the minimal legitimacy of the state concerned is lost and the social compact for reciprocal rights and duties between state and citizen is broken.

Carens takes a broad communitarian approach (communitarianism on the global plane) as a strand of justification for the international community’s duty to provide surrogate state protection to refugees. Carens argues that even if being assigned to a particular sovereign state works well for most people, it does not work as well for refugees. He states that refugees are in a situation where their state has failed them, either deliberately or through its incapacity. He then argues that ‘[b]ecause the state system assigns people to states, states have a collective responsibility to help those for whom this assignment is disastrous’. Carens’ thesis mirrors the theory of the minimally legitimate state. He argues that:

> If people flee from the state of their birth (or citizenship) because it fails to provide them with a place where they can live safely, then other states have a duty to provide a safe haven. Thus, we can see that states have a duty to admit refugees that derives from their own claim to exercise power legitimately in a world divided into states.

Hathaway aptly captures the *raison d’être* of international refugee law in a manner that seems to effectively summarise the moral, ethical and political grounding of refugeehood. He states that ‘In pith and substance, refugee law is not immigration law at all, but rather a system for the surrogate or substitute protection of human rights’, and that ‘Refugee status is a categorical designation that reflects a unique ethical and consequential legal entitlement to make claims on the international community.’

It can therefore be seen that there is an international moral, ethical and political human rights-based imperative for states to provide surrogate international protection to those persons whose states of nationality have either become persecutory or hugely burdened to a degree

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24 SP Sarker *Refugee Law in India: The Road from Ambiguity to Protection* (2017).
26 Ibid.
27 Hathaway (note 2 above) at 5.
that they cannot ensure minimal level human rights guarantees for their citizens. It is the state’s willingness and ability to ensure minimal threshold guarantees of human rights that foregrounds its legitimacy both as an international actor and as a domestic (and therefore primary) protector of citizens’ rights. Failure to meet the minimal level threshold either repudiates (in the case of outlaw — persecutory states) or otherwise ruptures (in the case of non-persecutory but severely burdened states) the social compact between the state and the citizen, and this triggers the international duty of surrogate protection.

III THE PRINCIPLE OF NON-REFOULEMENT IN INTERNATIONAL LAW

Refugees are very vulnerable people. As earlier stated, refugeehood results from persecutory conduct or other push factors that pose, or are likely to pose, a threat of serious harm to citizens. This situation creates an imperative for other states to provide surrogate protection. It must therefore necessarily follow that it would be ethically wrong and would constitute a serious denial of human rights for the receiving state to either turn asylum seekers back at the point of entry or send them back to the country where they are fleeing from. The principle of non-refoulement binds states to avoid this form of conduct. The principle is well expressed under art 33(1) of the 1951 Convention and art 2(3) of the 1969 OAU Convention. Jean Allain states that the principle forms the cornerstone of refugee law and that it is the ‘final bulwark of international protection.’

Sarker states that this principle is so fundamental to the concept of protection underlying the Refugee Convention that no reservation from this provision is permissible under international law. He observes that the principle of non-refoulement covers admission and non-rejection at the border of a state and that it is, therefore, the corollary of the right to seek asylum. He argues that in theory, the principle applies to all persons regardless of whether they meet the strict definition of refugee within the meaning of art 1A(2) of the 1951 Convention, and that

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29 Rawls describes two types of non-ideal theory of states. He describes what he calls the ‘outlaw State’ and the ‘burdened society [State].’ He states that the ‘outlaw State’ ‘deals with conditions of noncompliance, that is, with conditions in which certain regimes refuse to comply with a reasonable Law of Peoples’ where they think that this ‘advances, or might advance, the regime’s rational (not reasonable) interests.’ On the other hand, he describes the burdened society as the kind of non-ideal theory which ‘deals with unfavorable conditions, that is, with the conditions of societies whose historical, social, and economic circumstances make their achieving a well-ordered regime, whether liberal or decent, difficult if not impossible. These societies I call burdened societies.’ Rawls (note 20 above) 90.


31 Article 33(1) of the 1951 Convention provides that ‘No Contracting State shall expel or return (‘refoul’er) a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion.’

32 Article 2(3) of the 1969 OAU Convention states that ‘No person shall be subjected by a Member State to measures such as rejection at the frontier, return or expulsion, which would compel him to return to or remain in a territory where his life, physical integrity or liberty would be threatened for the reasons set out in Art I, paragraphs 1 and 2.’


34 Sarker (note 24 above) at 11.
‘good faith’ implementation of the principle requires states to consider whether a person is entitled to protection before returning them.35

The principle of non-refoulement is a cardinal principle of international refugee law and it is a rule of customary international law, enforceable against all states, erga omnes.36 Lauterpacht & Bethlehem have argued that within the scheme of the 1951 Convention, the prohibition on refoulement in art 33 is paramount, and that this is exemplified by the fact that it permits of no reservations.37 They therefore argue that the principle of non-refoulement in fact imposes a non-derogable obligation and that it embodies the humanitarian essence of the Convention.38 Lauterpacht & Bethlehem point out that this non-derogable character of the principle has been affirmed by both the United Nations General Assembly (UNGA) and the Executive Committee of the UNHCR (the Executive Committee).39 Lauterpacht & Bethlehem conclude by positing that in fact, the principle of non-refoulement should be considered as a peremptory norm of international law, i.e., a rule of jus cogens which permits of no derogations, limitations or restrictions. The Executive Committee of the UNHCR has observed that ‘the principle of non-refoulement has progressively acquired the character of a peremptory rule of international law.’40

Non-refoulement is not restricted to refugee law. International law generally proscribes conduct by host states that would expose individuals to the danger of torture or cruel, inhuman or degrading treatment or punishment upon return to another country by way of their extradition or expulsion to countries where there is a real risk of such danger.41

The Committee Against Torture (CAT Committee)42 has stated that,43 apart from the Convention Against Torture44 and the 1951 Convention itself,45 examples of other international provisions which are directly relevant to the application of the principle of ‘non-refoulement’ in cases of risk of torture and other ill-treatment for a person in the country to which the person is being deported may also be found in other relevant treaties. These include the International

37 Article 42(1) of the 1951 Convention.
38 Lauterpacht & Bethlehem (note 35 above) at 107, para. 51.
39 Conclusion No. 79 (XLVII) 1996, at para. (i); A/RES/51/75, 12 Feb 1997 at para. 3.
40 Conclusion No. 25 (XXXIII) 1982 at para. (b).
41 Human Rights Committee, General Comment No. 20 of 3 April 1992, Prohibition of Torture, para 9. The Committee states that the prohibition of torture under art 7 of the International Covenant on Civil and Political Rights, 1966 implied engenders the principle of non-refoulement; and that this principle is a norm of customary international law. Similarly, the Committee Against Torture, under General Comment No. 4 (2017) on the implementation of art 3 of the Convention in the context of art 22, CAT/C/GC/4, has stated that the principle of ‘non-refoulement’ of persons to another State where there are substantial grounds for believing that they would be in danger of being subjected to torture is absolute. Para 9. See also Gorki Ernesto Tapia Páez v Sweden (CAT/C/18/D/39/1996) para. 14.5; Núñez Chipana v Venezuela (CAT/C/21/D/110/1998), para. 5.6; Agiza v Sweden (CAT/C/34/D/233/2003) para. 13.8; Singh Sogi v Canada (CAT/C/39/D/297/2006), para. 10.2; Abdussamatov & Others v Kazakhstan (CAT/C/48/D/444/2010) para. 13.7; and Nasirov v Kazakhstan (CAT/C/52/D/475/2011) para. 11.6.
42 Established under art 17 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 1984.
44 Article 3(1).
45 Article 33(1).
Convention on the Protection of the Rights of All Migrant Workers and Members of their Families;\textsuperscript{46} the International Convention for the Protection of All Persons from Enforced Disappearance;\textsuperscript{47} the African Charter on Human and Peoples’ Rights;\textsuperscript{48} and the OAU Convention Governing the Specific Aspects of Refugee Problems in Africa.\textsuperscript{49}

All these provisions demonstrate the central importance that international human rights law places on the principle of \textit{non-refoulement} as a rule of both treaty law as well as customary international law.

\section*{IV \ \THE PRINCIPLE OF NON-REFOULEMENT UNDER DOMESTIC LAW: SOUTH AFRICA AND MALAWI}

\subsection*{A \ \Non-refoulement in South Africa}

The principle of \textit{non-refoulement} has been domesticated under South African law. Section 2 of the South African Refugees Act provides that notwithstanding any provision of the Act or any other law, no person may be refused entry into the Republic of South Africa, expelled, extradited or returned to any other country or be subject to any similar measure, if as a result of such measure, such person would be compelled to return to or remain in a country where he or she may face any of the risks or dangers envisaged by the refugee definitions under the 1951 and 1969 OAU conventions. In \textit{Minister of Home Affairs and Others v Watchenuka and Another (Watchenuka)},\textsuperscript{50} the South African Supreme Court of Appeal stated that the South African Refugees Act ‘was enacted to give effect to South Africa’s international obligations to receive refugees in accordance with standards and principles established in international law’, and that s 2 of the Act, that sets out the principle of \textit{non-refoulement}, exemplifies how the Act gives effect to such international obligations.

It is noteworthy, however, that even prior to the passage of the South African Refugees Act in 1998, the principle of \textit{non-refoulement} was, in the light of the Constitution of the Republic of South Africa, 1996\textsuperscript{51} (the Constitution), acknowledged and applied by South African courts. In \textit{Watchenuka}, the Court solemnly stated that:

\begin{quote}
Human dignity has no nationality. It is inherent in all people — citizens and non-citizens alike — simply because they are human. And while that person happens to be in this country — for whatever reason — it must be respected, and is protected, by s 10 of the Bill of Rights.\textsuperscript{52}
\end{quote}

In \textit{Kabuika and Another v Minister of Home Affairs and Others},\textsuperscript{53} the High Court acknowledged the principle of \textit{non-refoulement} as lying at the foundation of refugee protection in the country.\textsuperscript{54} Although South Africa was at the time yet to ratify the 1951 Convention, the Court acknowledged \textit{non-refoulement} as a customary international law principle that was

\begin{itemize}
\item Article 56 (3).
\item Article 16 (1).
\item Article 12 (3).
\item Articles II (3) and V (1).
\item [2003] ZASCA 142; [2004] 1 All SA 21 (SCA) para. 2.
\item The South African Constitution is based on, among others, the values of human dignity, the achievement of equality and the advancement of human rights and freedoms. Courts have interpreted refugee rights as guaranteed under international law, and in the context of the South African Constitutional, these values including s 232 of the Constitution.
\item \textit{Watchenuka} (note 50 above) at para 25.
\item 1997 (4) SA 341 (C).
\item Cape Provincial Division.
\end{itemize}
to be applied in making decisions concerning refugee status in South Africa. The decision was an early exemplification of the liberal stance that had been adopted by South African post-apartheid courts under a new Constitution. The High Court was eager to adopt a human rights-friendly approach to refugee protection by invoking international refugee law norms in the absence, at that stage, of a codified domestic refugee law regime.

Another significant decision on the principle of non-refoulement, albeit not made in the context of refugee law but significant to it, was *Mohamed and Another v President of the Republic of South Africa and Others (Society for the Abolition of the Death Penalty in South Africa and Another intervening).* The question that arose in that case was whether it was constitutional for South Africa, a country that had abolished the death penalty, to deport persons to another country where they would face the risk of the death penalty. In argument, the government argued that the prohibition would not apply as South Africa had simply deported and not extradited Mr. Mohamed to the United States of America. The Constitutional Court disagreed. The Court held that although the government claimed to have deported and not to have extradited Mr. Mohamed, this was of no relevance. The Court referred to art 3(1) of the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment on non-refoulement and stated that the principle:

> makes no distinction between expulsion, return or extradition of a person to another state to face an unacceptable form of punishment. All are prohibited, and the right of a state to deport an illegal alien is subject to that prohibition. That is the standard that our Constitution demands from our government in circumstances such as those that existed in the present case.

*Mohamed* establishes the point that the principle of non-refoulement is of universal application. It applies in all cases where there is a threat that a person would be subjected to torture, cruel, inhuman or other forms of ill-treatment in the country to which such person is sent. It also emphasises that the prohibition of acts amounting to refouler applies with equal force irrespective of whether one calls them deportations, expulsions, return or extradition. As long as they amount to sending the person to another country under circumstances where such person would be subjected to various forms of serious harm, the principle applies.

In *Union of Refugee Women and Others v The Director: Private Security Industry Regulatory Authority and Others*, Sachs J, after enumerating a wide array of rights that the 1951 Convention guarantees, stated that ‘in devising these … yardsticks, those who drafted the Convention clearly sought to ensure that refugees would not end up as pariahs at the margins of host societies.’ He then pointed out that it is particularly important that the Convention ‘protects refugees from being returned to the place where their lives and freedoms would be at risk (the principle of non-refoulement),’ and that collectively, ‘these obligations constitute a coherent and enforceable legal regime for refugees that are markedly more favourable than the discretionary regime generally applicable to immigrants.’

The principle was also highlighted in *Abdi and Another v Minister of Home Affairs and Others*, where the Supreme Court of Appeal held that the appellants would face a real risk of
suffering physical harm if they were forced to return to Somalia. The Court observed that it was obvious that no effective guarantee could be given to them against persecution or subject to some form of torture, or cruel, inhuman and degrading treatment if they were to be compelled to re-enter Somalia. The Court emphasized that it was the prevention of this type of harm that the South African Refugees Act sought to address by prohibiting a refugee’s deportation under such circumstances. The Court pointed out that deportation to another country that would result in the imposition of a cruel, unusual or degrading punishment was in conflict with the fundamental values of the Constitution. Thus, the Court in *Abdi* pointed out, again, that *non-refoulement* lay at the core of refugee protection.

Whilst the principle of *non-refoulement* was dealt with, to significant degrees, in the foregoing decisions of courts in South Africa, it was not until 2018 that the centrality of the principle was most forcefully discussed and applied by the Constitutional Court in two important decisions. The first decision was *Ruta*. In *Ruta*, the Court set out to determine three important issues. First, the Court was called upon to determine, as a matter of principle, whether an ‘illegal foreigner’ who claims to be a refugee and expresses intention to apply for asylum should be permitted to apply in accordance with the South African Refugees Act instead of being dealt with under the Immigration Act. The second issue was whether the 15-months’ delay between Mr Ruta’s arrival in South Africa in December 2014 and his arrest in March 2016 barred him from applying for refugee status. Thirdly, the Court was invited to decide, more generally, whether a foreigner may arrive in South Africa and tarry illegally for months without applying for refugee status, and then, when the law catches up with him, insist on exercising the right to apply for asylum.

The Court in *Ruta* answered all these questions in Mr. Ruta’s favour. The Court held that failure to apply for asylum at ‘the first available opportunity’ was not a ground for disqualifying the applicant. Cameron J referred to s 2 of the South African Refugees Act which provides for the principle of *non-refoulement*. He expressed some powerful words in affirmation of the principle. He stated that s 2 was a remarkable provision and unprecedented in the history of South Africa’s enactments. According to him, this was because s 2 places the prohibition it enacts above any contrary provision of the South African Refugees Act itself and ‘above anything in any other statute or legal provision.’ He explained that s 2 expresses the principle of *non-refoulement*, i.e., the concept that one fleeing persecution or threats to ‘his or her life, physical safety or freedom’ should not be made to return to the country inflicting it. Cameron J stated that the principle has become a deeply-lodged part of customary international

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law. He cautioned that in view of rather unfavourable approaches towards refugeehood being developed on other continents, ‘the response to these principles of African countries, including our own, is of profound importance.’

The decision in *Ruta* is one that arguably runs against the currency of popular public opinion. The idea that a person can enter the country without due legal process and then only claim that they seek asylum two years later upon being arrested might strike many as condonation of unacceptable and dishonest conduct. Yet, the decision was correct for at least two reasons. The first ground is to consider that a refugee is a vulnerable person whose main pre-occupation is to run away from serious harm or a threat thereof and find a place in another country in which he or she finds safety and protection. Once in a safe place, the refugee is pre-occupied with survival rather than fulfilment of formal state processes. In other words, there is a real possibility that the asylum seeker’s failure to formally apply for asylum may not be an indication that he or she is not a real refugee. Secondly, the decision in *Ruta* is correct considering the non-derogability of the principle of *non-refoulement*. Thus, once a person claims that he or she seeks to apply for asylum, it is important that the state must accept and scrupulously investigate the claim first before taking any further action that might result in deportation or expulsion, so that the risk of deporting and expelling the person under circumstances that would violate *non-refoulement* is eliminated.

The decision in *Ruta* is also significant in that it indicts many countries on other continents for their increasingly restrictive approaches towards admission to refugeehood of people who are in real need of surrogate state protection. The Court in *Ruta* then exhorts African countries, such as South Africa, to come up with their own principled responses to refugee and asylum seeker challenges. These principled responses should ensure that the application of the principle of *non-refoulement* under domestic law is safeguarded.

The second important case on the principle of *non-refoulement* which the Court dealt with in 2018 was *Saidi*. *Saidi* presents an interesting scenario. The applicants were asylum seekers in the Republic of South Africa. During the entire period for which their applications for asylum were being processed internally (i.e., within the DHA), the Refugee Reception Officer (RRO) readily granted extension of their asylum seeker permits. The asylum applications were however

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64 See UN General Assembly, Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 1465 United Nations Treaty Series, 85, 10 December 1984. Article 3 of the Convention Against Torture (CAT) provides: ‘1. No State Party shall expel, return ("refouler") or extradite a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture. 2. For the purpose of determining whether there are such grounds, the competent authorities shall take into account all relevant considerations including, where applicable, the existence in the State concerned of a consistent pattern of gross, flagrant or mass violations of human rights.’ South Africa became a State Party to the CAT on 10 December 1998, see UN Treaty Series Depository Records with respect to the Convention Against Torture, available at https://treaties.un.org/pages/ViewDetails.aspx?src=IND&mtdsg_no=IV-9&chapter=4&clang=_en. See also UN General Assembly, International Covenant on Civil and Political Rights, 999 UNTS, 171, 16 December 1966. Article 7 of the International Covenant on Civil and Political Rights (ICCPR) provides: ‘No one shall be subject to torture or to cruel, inhuman or degrading treatment or punishment.’ This art has been interpreted implicitly to include prohibition of refoulement. Read together with art 2(1) of the ICCPR, it is considered to provide broader scope than CAT. (UN Human Rights Committee, General Comment No. 31 (2004), UN Doc. HRI/GEN/Rev.8 at para 12.) South Africa became a State Party to the ICCPR on 10 December 1998, see UN Treaty Series Depository Records, available at https://treaties.un.org/Pages/ViewDetails.aspx?chapter=4&clang=_en&mtdsg_no=IV-4&src=IND.

65 2019 (2) SA 329 (CC) at paras 24–26.
subsequently rejected by the Refugee Status Determination Officer (RSDO) in terms of s 24(3) of the South African Refugees Act. The applicants unsuccessfully appealed and exhausted all the internal processes of appeal, and then brought an application to the High Court for review in terms of PAJA. Meanwhile, the RRO refused to extend the permits, arguing that under these circumstances, only the courts could grant the extensions sought. The dispute hinged on the interpretation ascribed by the RRO to s 22(1) as read with s 22(3).

22. (1) The Refugee Reception Officer must, pending the outcome of an application in terms of section 21(1), issue to the applicant an asylum seeker permit in the prescribed form allowing the applicant to sojourn in the Republic temporarily, subject to any conditions, determined by the Standing Committee, which are not in conflict with the Constitution or international law and are endorsed by the Refugee Reception Officer on the permit.

(3) A Refugee Reception Officer may from time to time extend the period for which a permit has been issued in terms of subsection (1), or amend the conditions subject to which a permit has been so issued.

Both the High Court and the Supreme Court of Appeal agreed that according to s 22(3), the RRO still had a discretion whether or not to grant an extension of the permit so long as the application for asylum was still pending for court determination under PAJA review. However, they concluded that such extension could not be automatic, giving the RRO no room for discretion, as argued by the applicants.

At the Constitutional Court, in an illuminating majority decision, Madlanga J determined not only that the RRO had power to grant extensions of the temporary asylum seeker permits under s 22(3), but that notwithstanding the use of the word ‘may’ in that provision, when it was read in the context of the duty of non-refoulement under s 2(1) of the South African Refugees Act and under international law, the provision imposes a peremptory duty to automatically extend the temporary permit pending outcome on the PAJA review of the internal rejection of the applicants’ asylum applications. The Court reasoned that without the requirement for the RRO to issue the extensions automatically, the provision could create room for the state to deport the applicants in the interim as they could have lost their right to remain and sojourn in South Africa. The Court held that this would potentially breach the important principle of non-refoulement.

The majority in the Saidi Court took the view that interpreting the provision to impose a duty to grant extensions comported with s 39(2) of the Constitution, which requires that courts must interpret legislation in a manner that promotes the spirit, purport and objects of the Bill of Rights. In this regard, the Court rejected the argument advanced by the Department of Home Affairs (DHA) that the word ‘outcome’ had to be interpreted to mean that the exhaustion of internal remedies and the exclusion of external judicial processes. The Court held that, consistent with s 39(2), the word ‘outcome’ had to be interpreted in a manner that best protects the fundamental rights of asylum seekers. It was the Court’s view that such an approach entailed that ‘outcome’ had to be understood to include the judicial review process under PAJA. This approach, according to the majority, would ensure protection of an asylum seeker’s right to just administrative action without the risk of deportation, right to freedom and security of the person, and right to life.

Again it is evident that at the centre of the Court’s decision to tie the hands of the RRO, taking away her discretion on whether or not to extend a temporary asylum seeker’s permit pending conclusion of a PAJA review, was the Court’s unflinching desire to uphold the
important international law principle of non-refoulement. Saidi shows how the constitutional value and right of human dignity can be used to inform a just and fair interpretation and application of PAJA in a manner that gives firm recognition to the principle of non-refoulement; and thus ensures heightened protection of refugee rights in South Africa.

Whilst this is so, it has also been observed that notwithstanding progressive refugee law jurisprudence in South Africa in relation to the principle of non-refoulement, the policy preferences of the executive have been at odds with such jurisprudence. Amit, for instance, notes that South African government officials have tended to question the country’s international obligations with respect to refugees. Amit quotes the Minister of Home Affairs criticising the fact that ‘law is written in such a progressive manner that you essentially cannot deny anyone the claim and temporary status of asylum-seeker, due to a number of precedent-setting rulings of our courts, as well as various clauses of the Refugee[s] Act.’

Amit’s research demonstrates that these centralised preferences of the government’s political leadership enable and reinforce the legal misunderstandings of street level actors ‘who directly control and deny asylum seekers access to the legal protections and procedures found in both the Refugees and Immigration Acts.’ Amit argues that:

street level actors exercise great discretion over who gets access to asylum at multiple stages of the process, effectively negating legally mandated rights. Individual offices have created their own discretionary procedures requiring that asylum seekers make frequent visits to these offices to maintain their legal status, placing them in a constant state of legal precarity while creating even more opportunities for street level actors to exercise their autonomy over the asylum process and thwart the realization of legal guarantees. The policy-generating practices of these actors, more than the legal framework, determine entitlements to asylum protection, often in ways that depart from the law.

Amit therefore bemoans the excessive power wielded by street level bureaucrats due to the discretion that they have which frequently results in a negation of refugee rights. What the Court has done in Saidi is to take away the exercise of discretion by an RRO regarding the most crucial aspect of refugee protection, namely the guarantee of the principle of non-refoulement. If the Court were to hold that the RRO should retain discretion and decide whether or not to extend temporary asylum permits pending the conclusion of the PAJA review process, as urged by DHA and supported by the minority in Saidi, there would be no guarantee that these misunderstandings and misapplications of the law could not persist.

Amit further describes the problems that asylum seekers face at RROs when they make applications for extension of their temporary asylum seeker permits:

Encounters described by asylum seekers reveal the attitudes driving these practices. Refugee reception office staff question both asylum seeker motives for leaving their countries of origin and their decision to come to South Africa ‘when we do not have enough resources for them.’ Often, the only way to overcome these attitudes and access services is by paying for protection…Asylum seekers have described the inner workings of this alternative process: ‘They ask for money outside and they share with the security guard. Inside we are called to a room. They call one of us who

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67 Ibid.
68 Ibid at 153.
must ask for R200 from the others and then when you collect the permit the official has already got the money.\(^{69}\)

This corruption dimension relates to the exercise of discretion by RROs which the Court in Saidi either did not contemplate or articulate in further support of the correct and principled approach that it took. Not only does removing the discretion on the part of the RRO remove the possibility of refoulement as a result of misunderstanding or misapplying the law; it would also help to minimise the prospect of corruption which increases when officials are granted wide discretion to make decisions concerning the fate of vulnerable people.

It needs to be pointed out that at the end of 2019, the South African Government promulgated Regulations under the South African Refugees Act that, in some respects, have a chilling effect on the enjoyment of political rights by refugees and raise the prospect of violation of the principle of non-refoulement by the South African state.\(^{70}\) Regulation 4(2), (3) & (4) states that:

(2) No refugee or asylum seeker may participate in any political activity or campaign in furtherance of any political party or political interests in the Republic.

(3) The Standing Committee may withdraw the refugee status of any person who participated in any political activity or campaign in furtherance of any political party or political interests in the Republic, or who has been found to have acted as contemplated in subregulation (1).

(4) Any person whose refugee status has been withdrawn shall be dealt with as an illegal foreigner in terms of the provisions of the Immigration Act.

One of the effects of this regulation, therefore, is that a refugee who is found to have taken part in any political activity or campaign deemed to offend the regulation is liable to deportation under the Immigration Act. Under art 33(2) of the 1951 Convention, the only instance in which a refugee might be treated in a manner otherwise inconsistent with the state’s obligation of non-refoulement is where there are reasonable grounds for regarding the refugee as a danger to the security of the country, or where the refugee has been convicted by a final judgment of a particularly serious crime, and that he or she constitutes a danger to the community of that country. It is clear that the proposed refugee regulations are inconsistent with international refugee law, in particular the principle of non-refoulement.

B Non-refoulement in Malawi

The framework legislation governing refugee rights and affairs in Malawi is the Refugees Act 3 of 1989 (Malawian Refugees Act). Just like its South African counterpart, the Malawian Refugees Act was passed in order to give effect to refugee conventions applicable to Malawi and generally to make provision relating to refugees in the country.\(^{71}\) The principle of non-refoulement is expressly provided for under s 10(1) of the Malawian Refugees Act, which provides that a refugee in Malawi shall not be expelled or returned to the borders of a country where his or her life or freedom will be threatened on account of any of the factors that define refugeehood under the 1951 and 1969 Conventions.

In Malawi, unlike in South Africa, there is a dearth of refugee law jurisprudence. There is a lone decision of the High Court, \textit{Aden Abdihaji and 67 Others v Republic},\(^{72}\) which dealt

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\(^{71}\) Long title to the Act.

\(^{72}\) Criminal Appeal No. 74 of 2005 (HC, LL).
with issues similar to the decisions the South African Constitutional Court grappled with in *Ruta*. In *Aden Abdihoji*, the appellants appealed against a decision of a Magistrate’s Court where they were all convicted of the offence of illegal entry into Malawi. They had arrived in Malawi without travel documents having fled from a war situation in Somalia. The conviction was entered after the appellants’ plea of guilty. In mitigation of sentence, they informed the Magistrate that they were in Malawi seeking asylum from Somalia where there was war. The state was opposed to giving the appellants an opportunity to apply for asylum, arguing that as at the time of their arrest the appellants had not yet submitted themselves to government officials to be registered as asylum seekers as required by law. The Magistrate’s Court proceeded to sentence each appellant to pay a fine of MK500 (about U$5 at the time) and recommended their deportation to Somalia. The Court further ordered that they be detained in custody pending such deportation. The appellants were therefore sent to prison.

On appeal to the High Court, the appellants argued, firstly, that they had been wrongly convicted because illegal entry under s 5(a) as read with s 39(2) of the Immigration Act was not an offence. The prosecution conceded this position but, rather bizarrely, still argued that the conviction be sustained because there had been a guilty plea. Effectively, the prosecution was arguing that the convictions be sustained although they were wrong in law. Secondly, the appellants argued that the Magistrate erred in failing to take the plea that they were in Malawi to seek asylum into account. They therefore argued that the Court was wrong to convict them. Thirdly, the appellants contended that the Magistrate misdirected himself by declaring them illegal immigrants before the Refugee Committee had considered their applications for asylum. Finally, the appellants argued that in view of their claim for asylum, the Magistrate erred in law in ordering that they be deported before their application had been determined. They contended that this was contrary to the customary international law principle of *non-refoulement*.

In its decision, the Court first observed that under s 10(4) of the Malawian Refugees Act, any person claiming to be a refugee (or indeed an asylum seeker) is permitted to enter and remain in Malawi for such period as the Refugee Committee may require to process his application for refugee status. The section provides that:

A person who has illegally entered Malawi for the purpose of seeking asylum as a refugee shall present himself to a competent officer within twenty hours of his entry or within such longer period as the competent officer may consider acceptable in the circumstances and such person shall not be detained, imprisoned, declared prohibited immigrant or otherwise penalized by reason only of his illegal entry or presence in Malawi unless and until the Committee has considered and made a decision on his application for refugee status.

In view of the scope of this provision, the Court held that even where an asylum seeker had entered Malawi without appropriate documentation as was the case in this matter, the law still prohibited the detention, imprisonment or any other form of penalisation on account of illegal entry. The law places paramountcy on the process of RSD, and the overall aim is to prevent *non-refoulement* and uphold the dignity of asylum seekers.

The principle of *non-refoulement* in Malawi is premised upon both international law tenets as described earlier, and statute. Section 10(1) of the Malawian Refugees Act provides that a refugee should not be expelled or returned to the borders of a country where his life or freedom would be threatened on account of various grounds premised on the refugee definitions under
both the 1951 Convention and the 1969 Convention. The Court noted the argument of the state that the appellants had to be sent back, on the basis of *refoulement*, to Somalia and found the argument untenable. Chombo J stated that the situation that the appellants were running away from was one of war. As such, she held that it would be overtaxing on any person coming from such a situation to expect them to have or to carry proper travel documents. The judge observed that at the point of departure for any such person, the main preoccupation is to escape to safety and not to make for proper transiting arrangements. She held that it would be against human rights principles to return the appellants to Somalia, and that this would be as good as sentencing them to death. She firmly grounded her decision in art 33 of the 1951 Convention which, according to the court, forbids any state party, under the principle of *non-refoulement*, from returning refugees to their countries of origin or any country at all that is at war.

The *Abdihaji* decision is of particular importance as it expressed, through judicial fiat, the concerns that the UNHCR had already previously expressed in respect of the policy of demanding travel documents from asylum seekers at points of entry. SAPA-SFP of April 17, 2001 (Blantyre) reported that “[T]he UNHCR chief in Malawi, Michael Owor, accused the government of flouting international conventions on refugees’, who emphasised, ‘Refugees don’t need papers. What sort of papers do they want?’” The Court, in *Abdihaji*, further held that the prohibition of *non-refoulement* was in tandem with the right of human dignity as provided for, among others, under s 12(v) of the Constitution.

Another interesting decision of the High Court that had a significant bearing on the principle of *non-refoulement* is *Kambiningi Jones and Others v Refugee Committee*. The applicants had all previously been granted refugee status in Malawi. However, during their stay, they allegedly caused so much trouble for the authorities in circumstances that the state concluded amounted to a threat to public order and national security. In the result, after according them a hearing, the Refugee Committee revoked their refugee status and deported them to Mozambique where they had expressed preference to be deported. Upon being deported, they later came back to Malawi and commenced judicial review proceedings against the decision to deport them. The court dismissed their application. The court, first, concluded that looking at the facts, it shared the view that the applicants posed a security threat to the Republic of Malawi. However, the basis of the High Court’s decision was that the applicants had no *locus standi* because they were no longer refugees but illegal immigrants in Malawi having been deported before and returned to Malawi illegally.

The central premise of the court’s decision in *Kambiningi Jones* was that the applicants did not have the right of access to justice in Malawi because they had been deported and returned to Malawi illegally. However, the court’s approach was erroneous. Firstly, the right of access to justice before the courts is not restricted to those who are legally in the country. Even persons illegally in Malawi are entitled to the human rights protections accorded by the Constitution, except those that are stated to only apply to citizens. For instance, if a person who is illegally present in Malawi is tortured, it would not lie in the mouth of the torturer to argue that the victim has no *locus standi* before Malawian courts on account of their immigration

73 The grounds are (a) race, religion, nationality or membership of a particular social group or political opinion; or (b) external aggression, occupation, foreign domination or events seriously disturbing the public order in either part or the whole of that country.

74 Cited in Hathaway (note 2 above) 371.

status. Secondly, it is evident that the court did not explore the issue of *non-refoulement* in earnest. There was no interrogation of whether the applicants might be subjected to various forms of ill-treatment in Mozambique. If, upon their illegal return to Malawi, the applicants alleged that they had been subjected to torture in Mozambique, the effect of the Malawian decision in denying them legal standing would be to violate the principle of *non-refoulement*. In my view, the principle of *non-refoulement* is non-derogable and it is now a norm of *jus cogens* (a peremptory norm of international law). In that regard, even where issues of national security arise, the State remains under an obligation to ensure that the country to which the refugees are deported is a safe country. I do not take a view on whether Mozambique was an unsafe country broadly speaking, but the authorities ought to have considered whether the applicants return from Mozambique was based on harm factors that would engage the principle of *non-refoulement*.

Another decision is that of a lower (Magistrate) Court, *Republic v Abdul Rahman and Others*, where the Magistrate arrived at effectively the same outcome as in *Aden Abdihaji*, albeit with much less comprehensive reasoning. Just like in *Aden Abdihaji*, notwithstanding a charge of illegal entry, the Magistrate ordered that the asylum seekers should be allowed to apply for asylum and taken to a designated refugee camp where they were to be kept under conditions that would guarantee their basic rights. The major difference between the two decisions was that in *Abdul Rahman*, the Magistrate Court sustained the convictions but suspended the sentences, whereas in *Aden Abdihaji*, the court quashed the convictions altogether.

### C  Non-refoulement: a comparative analysis of Malawi and South Africa

An exploration of jurisprudence in Malawi and other African States reveals that the approach taken in South Africa has not been mirrored in Malawi. In Malawi, there is no provision that expressly stipulates what a competent officer should do once asylum seekers present themselves to an officer seeking asylum. It should be noted here that although s 13(1)(b)(i) of the Malawian Refugees Act provides that the Minister may make regulations for carrying out or giving effect to the provisions of this Act, including making provision for the procedure to be followed by competent officers for the purpose of facilitating the entry of refugees and their family members, regrettably, the only regulations that have been made by the Minister under s 13 are regulations prescribing the ‘Procedure on application for refugee status in Malawi.’ No regulations have been prescribed to deal with the entry of refugees and their family members into Malawian territory. What emerges therefore is that much discretion is left to the immigration, police or security officer, who is the competent officer envisaged under the Malawian Refugees Act to determine what happens to a person seeking asylum who presents himself or herself at a port of entry for purposes of seeking asylum in Malawi.

An informed reading of the *Abdihaji* decision shows that Malawian authorities, unlike those in South Africa, do not issue a temporary asylum permit pending RSD. It seems that what the authorities demand is proof that the asylum seeker has applied for asylum. Such proof is supposed to guarantee *non-refoulement*. Unfortunately, that approach has proved problematic on the ground as authorities have, in various cases, rounded up asylum seekers for having no refugee status certificates notwithstanding that their applications for asylum are still pending.

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76 Criminal Cause No. 26 of 2005, Senior Resident Magistrate Court, LL.
77 See s 2 of the Act.
78 See Hathaway (note 2 above) at 371.
Secondly, in both *Ruta* in South Africa and *Abdihaji* in Malawi, courts have strongly emphasised the centrality of the principle of non-refoulement in refugee protection. They have made it clear that delay in applying for asylum is no ground for denying an asylum seeker the opportunity to present their application even in instances, as in *Ruta*, where the applicant’s illegal entry is only discovered due to the commission of an offence. Both courts premise their reasoning on the pre-eminent character of the principle of non-refoulement. This principle forms the central edifice upon which the entire refugee protection framework is premised and without its effective guarantee the whole global scheme of refugee protection would utterly collapse. However, the approach of the court in the Malawian *Kambiningi Jones* case shows no appreciation or engagement by the court with the principle of non-refoulement in an instance where issues of revocation of refugee status, illegal return to Malawi and a quest to seek justice through the courts were implicated. The court ought to have provided a platform for the refugees to express themselves in order to ensure that the decision of the government did not expose the applicants to a risk of refoulement. Terminating the proceeding on technical grounds of *locus standi* posed a risk of the possibility of a proscribed form of refoulement.

Thirdly, under the South African framework, as observed by Cameron J in *Ruta*, the South African Refugees Act has a primacy clause which trumps all other provisions in the Act and under other laws which may otherwise have the effect of negating the principle of non-refoulement. By contrast, s 10(1) of the Malawian Refugees Act is not couched as a primacy clause.

Fourthly, under the South African regime, the scope of the principle of non-refoulement under s 2 of the South African Refugees Act extends to the obligation of relevant South African authorities not to refuse an asylum seeker entry into the Republic. Again, in comparison, s 10(1) of the Malawian Refugees Act simply states that ‘A refugee shall not be expelled or returned to the borders of a country where his life or freedom will be threatened’. The Malawian provision therefore expresses the obligation not to expel or ‘return to the borders.’ This envisages a scenario in which the asylum seeker is already within the jurisdiction of Malawi. There is, however, no express statutory obligation not to refuse an asylum seeker entry. At best, it could be implied in the duty not to return such a person. An express provision would be ideal. The duty not to refuse an asylum seeker entry into the territory of the prospective host State (non-rejection at the frontier) is a core aspect of the principle of non-refoulement.

Whilst there is no record of Malawian authorities refusing asylum seekers entry into the Republic, the gap in the law creates a loophole for some street level authorities (immigration authorities in the field) to seek to exercise discretion and refuse an asylum seeker access to entry into Malawi. In fact, it would not be too speculative to suggest that there have been unreported cases of refusal of entry at point of entry, given the well-evidenced propensity of Malawian immigration authorities to depart from the demands of the principle of non-refoulement. As some of the decisions that I discuss in this paper show, immigration authorities have been too quick to proceed with the deportation of asylum seekers back to conflict zones at the mere suggestion of some non-compliance with ordinary rules of immigration.

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79 South African Refugees Act, s 2.

80 Art 2(3) of the 1969 OAU Convention for instance provides that ‘No person shall be subjected by a Member State to measures such as rejection at the frontier, return or expulsion, which would compel him to return to or remain in a territory where his life, physical integrity or liberty would be threatened for the reasons set out in Art I, paragraphs 1 and 2.’
V RECOMMENDATIONS

From the present study’s analysis, it is evident that the principle of non-refoulement is more strongly guaranteed under the South African refugee protection framework than it is under the Malawian framework. It is therefore strongly recommended, in view of the centrality and high status of the principle of non-refoulement under international law, that legislative reform on refugee law in Malawi should follow upon that of South Africa so as to ensure legislative primacy for the principle of non-refoulement in the Malawian Refugees Act.81

Further, the law in Malawi should also expressly impose the obligation not to refuse an asylum seeker entry into the jurisdiction until their application for refugee status has been finally determined. The need for such legislative reform cannot be overemphasised considering that non-refoulement is not only as a rule of customary international law; but also, as Lauterpacht, the UNHCR and others state, that it has now matured into a peremptory norm of international law (jus cogens).

In Ruta, Cameron J made a crucial observation that on other continents, we are witnessing the rise of inhospitable approaches to refugeehood, and that in that context, it is of profound importance that African states should ensure that their responses to principles such as non-refoulement continue to reflect a unique African spirit.82 D’Orsi provides, as an example of this African spirit, the case of Malawi where, against all the odds, with pervasive poverty, a dense population and a poor human rights record at the time, over a million Mozambican refugees were shown hospitality in the 1980s without the threat of being sent back to Mozambique against their will.83 It is therefore recommended that much research effort and innovation be invested towards coming up with a uniquely African regime of non-refoulement as a progressive torchbearer in the protection of refugees. Research centres such as the Council for the Development of Social Science Research in Africa (CODESRIA) could play a leading role in such an effort.

The South African Refugees Regulations of 27 December 2019, in some respects, constrict the enjoyment of some fundamental refugee rights such as freedom of expression, and they introduce measures which would render refugees who are legitimately exercising their political expression rights liable to deportation and thus being vulnerable to refoulement measures by the South African state. It is recommended that these regulations be urgently reviewed and that such unduly restrictive measures on the enjoyment of rights, and particularly in so far as they may enable the state to deport such refugees, be repealed.

Finally, in a 2013 work,84 I proposed the adoption of a Charter on the Movement and Treatment of Refugees in the SADC Region to ensure a harmonised protection system, and also for SADC to adopt Model Legislation on Refugees in order to provide a standard legal framework to be used as a benchmark for the review and reform of national legislation relating

81 Malawian Refugees Act s 10(1).
82 Ruta (note 62 above) at paras 24–26.
83 D’Orsi (note 8 above) at 55.
to refugees in the region, in conformity with international human rights standards. I persist with that proposal, which comports with strong emerging jurisprudence on refugee law such as that in Ruta and Saidi in South Africa, and Aden Abdi Haji in Malawi.

VI CONCLUSION

The principle of non-refoulement is a core principle of international law. It is not only a principle of customary international law, but it has arguably crystallised into a peremptory norm of international law (jus cogens). Both the South African and Malawian constitutions enjoin courts, when interpreting the Bill of Rights, to consider international law. Further, both states are bound by international law obligations whether arising out of treaty law, customary international law, jus cogens norms or otherwise. What the consistent jurisprudence of the Constitutional Court over the past two decades shows, exemplified most recently by the decisions in Ruta and Saidi, is that the Court is giving the principle of non-refoulement full recognition and upholding it in its pronouncements. Fortunately for South Africa, the jurisprudence is supported by a legislative framework for refugee protection that is already significantly protective of refugee rights. This has enabled the development of a body of jurisprudence that is generally consistent with international refugee law norms. Again, in South Africa, there is a body of more active human rights defenders with a keen interest in refugee rights unlike in many other African countries, including Malawi. That is why, outside of South Africa, there is a paucity of refugee law jurisprudence by higher courts of record.

The story, however, is not all rosy for South Africa. As I have described above, there is an enduring problem of bad practices that violate human rights. Progressive judicial pronouncements, and a progressive refugee law legislative framework, frequently mean less in terms of the actual experiences of refugees, especially those of asylum seekers whose status is yet to be decided by the authorities. There is evidence of entrenched institutional fatigue within the DHA to handle significant volumes of asylum seekers and authorities at high levels have openly expressed their frustration at the progressive nature of the refugee protection framework. They have stated that the progressive nature of the law comes in the way of their desire to return or send back asylum seekers. The result of this approach, it seems, is that it has also created fertile ground for corrupt practices by some officers. These are worrisome developments. However, what is important is that the courts should remain vigilant and steadfast in presenting the last bastion of protection for the asylum seekers and refugees from practices that amount to or pose a threat of refoulement. Courts need to remain resolute in affirming the principle of non-refoulement.

In Malawi, the approach adopted in the lone decision of the High Court, the Abdi Haji case, decided in 2005, was quite progressive. The Court affirmed the principle of non-refoulement, articulating the issues that would later also be raised by the South African Constitutional Court in Ruta in 2018. The problem with the Malawian position is that there are too many legislative gaps. The legislative refugee protection framework is weak. It does not even guarantee the right of the asylum seeker to enter at the point of entry. The Malawian refugee framework does not make provision for the issuance of temporary asylum seeker permits as authority for legal


86 Constitution of South Africa s 39; Constitution of Malawi s 11(2)(c).
residence within the jurisdiction. The result is that asylum seekers are frequently subjected to arbitrary arrests and threats of deportation that amount to refoulement or threats of it which are prohibited under international law.

The position obtaining in Malawi seems to be reflected in various other southern African jurisdictions including Botswana — Refugees (Recognition and Control) Act, 1968; Lesotho — Refugee Act 18 of 1983; Tanzania — Refugees Act 9 of 1998; and Zimbabwe — Refugees Act, 1983. Zambia is the only jurisdiction outside South Africa that has passed legislation that comprehensively guarantees the principle of non-refoulement in a comparable manner to the South African regime.\textsuperscript{87} This is particularly evident in s 23(1) of the Zambian Refugees Act.\textsuperscript{88} Perhaps this development is unsurprising considering that this is a very recent piece of legislation and it demonstrates that the framers of the Zambian Act took into account recent developments in international refugee law.

All in all, the decisions of the Constitutional Court in \textit{Ruta} and \textit{Saidi} provide an important clarion call for other jurisdictions in the region to review their refugee legislative frameworks and modernise them in tandem with current norms of international refugee law.

\textsuperscript{87} Refugees Act 1 of 2017 of Zambia.

\textsuperscript{88} Ibid. Section 23(1) provides that 'Despite the provisions of any other law, a person shall not be refused entry into Zambia or be expelled, extradited or returned from Zambia to another country if that refusal, expulsion or return would compel that person to return to or remain in a country where — (a) that person may be subjected to persecution on account of that person’s race, religion, nationality, membership of a particular social group or political opinion; or (b) that person’s life, physical well-being or liberty is threatened by external aggression, occupation, foreign domination or event seriously disrupting public order in part or the whole of that country.'
The Constitutional Court’s Judgment in the SADC Tribunal Case: International Law Continues to Befuddle

DIRE TLADI

ABSTRACT: This article considers the Constitutional Court judgment in the SADC Tribunal judgment from the perspective of the methodology of international law. The judgment came to the conclusion that the President’s conduct in participating in the SADC’s decisions to remove its Tribunal’s jurisdiction over complaints from individuals was unlawful and unconstitutional. This conclusion was based on two international law propositions: first, on the proposition that the SADC decisions were in breach of international law; second, that the decisions of SADC can be imputed to the South African government. The article shows that the judgment does not apply the methodology of international law in arriving at these propositions. It argues that in keeping with South Africa’s reputation as a having an ‘international law-friendly’ framework, our pinnacle Court should do more to respect the methodology of international law.

KEYWORDS: methodology of international law, relation between international law and domestic law, SADC Tribunal, State responsibility, treaty interpretation

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I INTRODUCTION

In the immediate aftermath of the adoption of the Constitution (and the Interim Constitution), international lawyers were excited by the Constitution’s openness and friendly disposition towards international law.¹ The excitement was, however, soon peppered by misgivings from some quarters. Some observers questioned whether the Court really ‘considered’ international law or merely referred to international instruments.² Others questioned the substance of the Court’s decisions on international law.³ One issue that has not been in focus, at least not until recently, has been whether the Court in applying international law has faithfully applied the methodology of international law.⁴ By the methodology (in contrast to the content of the rules), I mean the manner in which the rules are identified and the manner in which the content of such rules are determined.

In its judgment in Law Society of South Africa v President of South Africa⁵ (the SADC Tribunal judgment) of 11 December 2018, the Court decided that the participation of the President of the Republic of South Africa in stripping away the powers of the Southern African Development Community (SADC) Tribunal to hear individual claims was unconstitutional.⁶ This judgment provides an opportunity to review the areas of critique mentioned above, i.e. whether the Court did more than just refer to instruments of international law or whether it acknowledged international law by giving meaning to the international law instruments it referred to by making pronouncements on the state of those laws (as opposed to ad hoc references to international instruments)? Did the Court, in its search for the meaning of instruments of international law and in determining the state of that international law, apply the correct approach and methodology? To be clear, the SADC Tribunal judgment was not based on the application of international law as an independent source of law. Instead, the Court used international law in the application of South African constitutional provisions. Thus, the Court, in the SADC Tribunal judgment was not concerned, at least not primarily so, with whether the President

² HA Strydom & K Hopkins ‘International Law’ in S Woolman, M Bishop & J Brickhill (eds) Constitutional Law of South Africa vol 2 (2nd Ed, 2013) 30-11, stating that ‘[a]lthough evidence of real consideration and application of international law is scant, there has been significant reference to international human rights jurisprudence’ (Emphasis in the original.)
⁵ Law Society of South Africa & Others v President of the Republic of South Africa & Others [2018] ZACC 51; 2019 (3) SA 30 (CC) (‘SADC Tribunal’).
⁶ The High Court of Tanzania in Tanganyika Law Society v Ministry of Foreign Affairs and International Cooperation of the United Republic of Tanzania & Another, Miscellaneous Civil Cause No 23 of 2014 judgment of 4 June 2019, came to largely the same conclusion on the basis of the same reason. That judgment, however, depends less on international law and much more on Tanzanian domestic law. However, to the extent that the international law conclusions of that Court add anything to (or detract from) the analysis in this chapter, these will also be considered briefly.

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violated international law. Rather, it was preoccupied with whether the President’s participation in SADC processes that led to the removal of the competence of the SADC Tribunal to hear complaints from private persons was unconstitutional, irrational and therefore unlawful. It came to the conclusion that the President’s conduct was unconstitutional, irrational and therefore unlawful. Yet in coming to this conclusion about the constitutionality of the President’s conduct — the Court’s main preoccupation — the Court relied on international law. In particular, the Court determined that the President’s conduct had been unconstitutional because it was in breach of South Africa’s international law obligations.

At its core, the SADC Tribunal judgment concerns the intersection between the Constitution and international law. It falls within what, in the American tradition, is referred to as foreign relations law — a tradition which is ever-expanding. This area of law addresses, inter alia, aspects such as the distribution of competences between the different branches of government in the conduct of international relations. I consider the foreign relations aspects of the SADC Tribunal judgment in more detail in a forthcoming chapter in a book. In this contribution, I therefore focus only on the international law analysis of the judgment, assessing not only whether the Court came to the correct conclusion about whether the President’s conduct violated South Africa’s international law obligations, but, more importantly, whether the Court followed the correct methodology.

The SADC Tribunal judgment has already received some praise in academic literature. The approach of the majority to the role of international law in the determination of whether the Constitution had been violated was, however, criticised by JJ Cameron and Froneman in their concurring judgment in SADC Tribunal. My concern is not only that the Court is wrong in the manner in which it identified the existence and content of the international law obligations it put forward, but also that its reasoning was illogical. It is this aspect — the determination by the Court of the existence, content and breach of international obligations — that is at the heart of this article. Thus, the questions that will likely arise from a purely constitutional law perspective such as whether the Court deferred to the executive sufficiently, whether there was a constitutional right at issue or whether the Court applied the correct constitutional standard of review are not addressed in this article. Similarly, the subject of the separate judgment’s critique of the majority, i.e. the appropriateness of determining a constitutional breach on the basis of a breach of international law — as opposed to using international law as an interpretative tool — is also not at issue in this

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7 The chapter is tentatively titled ‘A Constitution Made for Mandela, A Constitutional Jurisprudence Developed for Zuma: The Erosion of Discretion of the Executive in Foreign Relations’ and will appear in a collection of essays edited by H Aust & T Kleinlein, titled Bridges and Boundaries: the Various Encounters between Foreign Relations Law and International Law. The chapter looks at two Constitutional Court judgments, namely the SADC Tribunal judgment and the Democratic Alliance v Minister of International Relations and Cooperation & Others [2017] ZAGPPHC 53; 2017 (3) SA 212 (GP) concerning the government’s failed withdrawal from the Rome Statute. While the latter judgment is easily defensible, the chapter’s main conclusion is that while the courts have continued to pay lip service to the discretion afforded to the Mandela/Mbeki administrations in the conduct of foreign relations, any such discretion has all but been eroded in the Zuma years.

8 See M du Plessis & A Coutsoudis ‘We are all International Lawyers Now: The Constitution’s International Trifecta Comes of Age’ (2019) 136 South African Law Journal 433, although, in fairness, this article is focused more on the fact that the Constitutional Court used international law rather than on the way in which the content of the rules of international law were used.

9 SADC Tribunal (note 5 above) (Separate concurring opinion of JJ Cameron and Froneman with JJ Mhlantla and Petse concurring.)
article. My concern is solely with the approach of the Court in determining the existence of an international law obligation, what the content of that obligation is and whether the President breached that obligation.

II THE SADC TRIBUNAL JUDGMENT

The SADC Tribunal judgment concerned an application by the Law Society and other applicants for a declaratory order that the decisions of President of the South Africa to support a resolution suspending the operation of the SADC Tribunal in 2011 and to sign the subsequent Protocol in 2014 were unconstitutional. The 2011 resolution and the 2014 Protocol, according to the application, together sought to take away the Tribunal’s power to adjudicate individual disputes against State parties.

The 2011 resolution of SADC, and the subsequent decision to adopt the 2014 Protocol, had a particular political context, namely Zimbabwe’s infamous land reform policy, which by most accounts had disastrous consequences for that country, and some negative impacts for the region. In response to adverse findings by the SADC Tribunal against Zimbabwe, which were confirmed and deemed enforceable in South Africa by the South African Constitutional Court, the government of Zimbabwe led a charge to disempower the SADC Tribunal, which eventually led to the adoption of the 2014 Protocol. Prior to that decision, SADC took three successive decisions which led to the disempowerment of the Tribunal to deal with individual complaints against States. The first set of decisions, adopted in August 2010 and May 2011, had the effect of preventing appointments of judges and, thus, preventing the Tribunal from functioning. Second, in May 2011, the SADC Summit decided that SADC Tribunal would not be permitted to hear any cases or complete any existing cases. Third, in August 2012, the Summit took an in-principle decision that a new Protocol would be adopted establishing a new SADC Tribunal which would only have jurisdiction to hear interstate disputes. This was followed by the 2014 decision to adopt a new Protocol replacing the 2000 Protocol.

The Court found that the President’s participation in these decisions, which resulted in the suspension, dissolution and eventual replacement of the SADC Tribunal by a new one, had been ‘unconstitutional, unlawful and irrational’ and, as a consequence, the President was ‘directed to withdraw his signature from the 2014 Protocol’. The Court’s conclusions that the President’s conduct was irrational, unlawful and unconstitutional were all based on a similar pillar, namely that the decisions were inconsistent with South Africa’s obligations under international law. The concurring judgment of Judges Cameron and Froneman, in which Judges Mhlantla and Petse joined, agrees with the majority in all respects except that their opinion judgment was not based on international law. According to them, the ‘irrationality and […] unlawfulness [of the President’s conduct] spring not from any affront the President

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10 The South African Constitutional Court decided that the judgment of the SADC Tribunal was enforceable in South Africa in Mike Campbell & Others v The Republic of Zimbabwe [2008] SADC Tribunal Case No. 2/2007; The Government of the Republic of Zimbabwe v Louis Karel Fick & Others Case CCT 101/12 [2013] (10) BCLR 1103 (CC) (‘Zimbabwe v Fick’).

11 As an aside, the WTO Appeals is in a similar position and has been unable to hear any new appeals since the US refused to cooperate in the appointment of members of the Appellate Body. See A Beattie ‘WTO to Suffer Heavy Blow as US Stymies Appeals Body’, Financial Times (8 December 2019), available at https://www.ft.com/content/f0f92b8-19c4-11ea-97df-cc63de1d73f4.

12 SADC Tribunal (note 5 above) para 97.
directly inflicted on international law, but from the infringement of our own Constitution.”¹³ According to the concurring judgment ‘[t]he unlawfulness of the President’s conduct derives from its breach of sections 7(2) and 8 of the Constitution’ and ‘does not derive directly from any violation of international treaty provisions.’¹⁴ Moreover, ‘[i]t is […] in the Constitution alone that we should ground the finding that the President behaved irrationally and unlawfully, and not directly under international law or treaty provisions.”¹⁵

Early on in the judgment, the Court had made it clear the importance of international law in our constitutional dispensation, recalling, inter alia, its ‘centrality in shaping our democracy’ and its ‘well-deserved prominence in the architecture of our constitutional order.’¹⁶ Then, having described the three ways that international law can be relevant in our constitutional adjudication — i.e. to interpret the Bill of Rights under s 39, to interpret any legislation under s 233 and, through direct application of customary international law in s 232 (one could add direct application under s 231(4) of the Constitution) — the Court stated that this triad of international law that was used implies that ‘consistency with our Constitution is a critical requirement for the acceptability and applicability of international law to our country’.¹⁷ In my view this statement is incorrect and falls foul of the basic rule of international law embodied in arts 27 and 46 of the Vienna Convention on the Law of Treaties (Vienna Convention).¹⁸

The validity of international law, or its applicability, does not depend on its consistency with the South African Constitution or any other constitution.

Having established the importance of international law for our constitutional framework, the Court then stated that, though the President has extensive powers, the ‘principle of legality entails […] that the President may only exercise power that was lawfully conferred on her’.¹⁹

From this unassailable statement, the Court made the following observation:

Both Houses of our Parliament resolved, in terms of the predecessor of section 231(2) of the Constitution, to ratify the [SADC] Treaty. For this reason, no constitutional office-bearer, including our President may act … contrary to its provisions. They are all, as agents of the State, under an international law obligation to act in line with its commitment made in terms of that Treaty. And there was and still is no legal basis for the President to act contrary to the unvaried provision of a binding Treaty.²⁰

According to the Court, ‘when our President decided to be party to the suspension of the Tribunal and to actually sign the [2014] Protocol, he was acting in a manner that undermined our international law obligations under the Treaty’.²¹ In its view, and based on

¹³ Separate concurring judgment (note 9 above) para 98.
¹⁴ Ibid at para 101. See also para 102: ‘The same reservation applies to the approach of the majority judgment to irrationality. This likewise appears to apply the principle of irrationality to the President’s conduct in the setting of international law, rather than in the sole context of domestic law […] But this same conduct, irrational and irregular within our own constitutional framework, did not constitute an international law violation on the part of the President himself.’
¹⁵ Ibid at para 103.
¹⁶ SADC Tribunal (note 5 above) at para 4.
¹⁷ Ibid para 5.
¹⁸ Article 27 of the 1969 Vienna Convention on the Law of Treaties states that a party to a treaty ‘may not invoke the provisions of its internal law as justification for its failure to perform a treaty’. Article 46 has less to do with the substance of the law and more to do with the procedure for entering into treaties.
¹⁹ SADC Tribunal (note 5 above) at para 48.
²⁰ Ibid.
²¹ Ibid para 53.
art 26 of the Vienna Convention — the *pacta sunt servanda* rule — South Africa is under an obligation not to undermine the SADC Treaty. The essence of the Court’s contention is thus that by participating in the decision by SADC, the President violated the SADC Treaty and thus acted unconstitutionally.

There are two assumptions concerning the relationship between South African law and international law falling outside the scope of the article on which the Court’s judgment is based that need to be mentioned. First, the Court appeared to assume that the decision by Parliament to approve ratification establishes international obligations on the President with regard to the assumption of future international obligations. This assumption, which will not be tested here, is consistent with the High Court judgment in *Democratic Alliance v Minister of International Relations* in which the Court determined that approval by Parliament appears to have some consequence for what the executive may and may not do on the international plane. Second, it suggests that international law obligations have direct effect on the domestic plane.

The conclusion that the President’s participation was in breach of international law obligations, the focus of this article, is itself based on a number of assumptions. First, it assumes that the SADC Treaty (or perhaps general international law) established some obligation on SADC and its member States to create or maintain a Tribunal to which individuals would have access. Second, it assumes that the decision by the SADC Summit itself was in violation of this obligation under international law. Third, assuming the decision by SADC was indeed a breach of some international rule, it assumes that this decision was attributable to the South African President, or more accurately the South African government. Alternatively, it assumes that there was a legal obligation on South Africa under international law to take measures to prevent SADC from adopting a decision doing away with individual access. The correctness of these assumptions is evaluated in the next section.

### III THE PRESIDENT’S PARTICIPATION IN THE SADC SUMMITS: A BREACH OF INTERNATIONAL LAW?

#### A General observations

The *SADC Tribunal* judgment is based on a determination that the President’s participation at the SADC meetings that did away with the competence of the SADC Tribunal to hear individual claims against States was a breach of South Africa’s obligations under international law. A determination that there has been a breach of an international obligation should not be arrived at lightly. It has to be shown by first viewing the source of the legal obligation — whether treaty or customary international law; then recounting the content of the obligation

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22 Ibid para 54.
23 For a contrary position, see F Sucker ‘Approval of an International Treaty in Parliament: How Does Section 231(2) “Bind the Republic”?’ (2013) 5 Constitutional Court Review 417, e.g. at 422 (‘compliance with such internal constitutional requirements is utterly irrelevant for the entering into force of international treaties and does not influence whether an international treaty is binding for South Africa at the international level’).
24 *Democratic Alliance v Minister of International Relations and Cooperation* (note 7 above).
and the conduct that it is alleged to have breached. There are, under international law, no exceptions to this basic principle. Applying the methodology of international law, this section assesses each of the assumptions necessary to justify the conclusion that the President’s conduct constituted a breach of international law.

Before addressing the assumptions, I should point out that the decisions of the SADC Summit concerning the SADC Tribunal have served before other international tribunals (judicial and quasi-judicial bodies) prior to the SADC Tribunal judgment of the Constitutional Court. While judicial decisions are not, in and of themselves, binding under international law and only serve as subsidiary means for the determination of rules of international law, one would have expected the Court to have taken them into account. The openness to international jurisprudence is, after all, one of the reasons that the South African constitutional framework acquired the label of being ‘international law-friendly’. Yet the Court does not consider them at all. Given that these other decisions are not considered at all in the SADC Tribunal judgment, it is worthwhile describing them briefly.

The first matter of direct relevance to the SADC Tribunal judgment is the decision of the African Commission on Human and Peoples’ Rights (African Commission) in Luke Munyandu Tembani and Benjamin John Freeth (represented by Norman Tjombe) v Angola and Thirteen Others (incidentally, the applicant in that matter is the second applicant in the SADC Tribunal judgment before the Constitutional Court). As in the SADC Tribunal judgment, the applicants sought to declare invalid the decision of the SADC Summit to remove the Tribunal’s competence to hear individual complaints. The Luke Munyandu Tembani matter was different from the SADC Tribunal judgment in that it did not concern the consistency of the SADC Summit decisions with the SADC Treaty but rather the consistency of the decisions with the African Charter on Human and Peoples’ Rights (African Charter) and, in particular, the right of access to the court under arts 7 and 26 the African Charter. The Constitutional Court, as will be seen below, postulated that the SADC Treaty provides for the right of access to the courts. Thus, while the source of the obligation is different, the right claimed in Luke Munyandu Tembani decision is the same as the one at issue in the SADC Tribunal judgment. In Luke Munyandu Tembani, the African Commission determined that the right of access

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25 Article 2 of the Articles on the Responsibility of States for Internationally Wrongful Acts Yearbook of the International Law Commission (Vol II (Part II) 2001) 20. See especially para 7 of the commentary to art 2 (‘The second condition for the existence of an internationally wrongful act is that the conduct attributable to the State should constitute a breach of an obligation of that State. The terminology of breach of an international obligation of the State is long established and is used to cover both treaty and non-treaty obligations.’).

26 Ibid at para 9 of the commentary art 2 (‘there is no exception to the principle stated in article 2’).

27 Article 38(1)(d) of the Statute of the International Court of Justice.

28 See generally Botha (note 3 above).

29 Luke Munyandu Tembani & Benjamin John Freeth (represented by Norman Tjombe) v Angola & Thirteen Others Communication 409/12, 2013. The thirteen others are the 13 other members of SADC, including South Africa.

30 SADC Tribunal (note 5 above) paras 29 (‘The right in the Bill of Rights and the [SADC] Treaty that is being threatened here is the right to access to justice’). See also paras 15 and 53 amongst several others where the Court refers to the right of access to justice or access to the courts as the right being violated by the decisions of the SADC Summit.
to justice ‘applied to national courts’ and not to international courts.\textsuperscript{31} I am not suggesting that the Constitutional Court ought to have followed the Commission’s decision, but in keeping with Makwanyane and the general trend of South African constitutional jurisprudence to consider decisions of regional human rights bodies, the Constitutional Court ought to have considered the African Commission’s decision in Luke Munyandu Tembani. While Luke Munyandu Tembani does not constitute an authoritative interpretation for either the South African Constitution or the SADC Treaty (the two instruments at issue in the SADC Tribunal judgment), it does offer an interpretation of a generally recognised right at issue in the matter, which could, as described below, serve as an interpretative tool for the SADC Treaty and related instruments under art 31(3)(c) of the Vienna Convention.

The second case of relevance to the SADC Tribunal judgment is an investor State arbitration concerning a South African diamond mining company, Swissbourgh, whose mineral rights in Lesotho had allegedly been expropriated to make way for the Lesotho Highlands Water Project. Prior to the impugned decisions, the owner of the mining company, Mr Josias van Zyl, a South African national, approached the South African courts seeking diplomatic protection, but was ultimately unsuccessful.\textsuperscript{32} Subsequent to the impugned decision of the SADC Summit concerning the Tribunal, Swissbourgh filed an investment claim with the Permanent Court of Arbitration (PCA) against the government of Lesotho claiming that Lesotho’s participation in the decision-making processes of SADC — referred to in all the relevant papers in those arbitral proceedings as the ‘shuttering of the Tribunal’\textsuperscript{33} — constituted a violation of its rights under the SADC Treaty regime, including the Investment Protocol. Thus, unlike Luke Munyandu Tembani, the Swissbourgh arbitration was based on exactly the arguments as those of the Law Society, i.e. the SADC decisions were a violation of the right of access to justice or access to the courts under the 2000 SADC Protocol and that such decisions were attributable to Lesotho.\textsuperscript{34}

In a majority judgment of two to one, the arbitral tribunal determined that Lesotho’s participation in the decision-making process to ‘shutter the Tribunal’ did constitute a violation of international law and that Lesotho could be held liable for the damages.\textsuperscript{35} Incidentally, the

\textsuperscript{31} Luke Munyandu Tembani decision (note 29 above) at paras 139, 144, 146. Incidentally, the High Court of Tanzania was aware of the Luke Munyandu Tembani decision and sought to take it into account. However, the High Court of Tanzania sought to dismiss Luke Munyandu Tembani by implying that the Commission’s decision was based on a jurisdictional technicality. See Tanganyika Law Society (note 6 above) at 9. In truth, however, the Commission does consider the substantive argument of whether a right of access to international courts exists under international law. The fact that the Commission feels fit only to look at the right from the perspective of the rights contained in the African Charter and not the SADC Treaty is neither here nor there, particularly since the right of access to courts is explicitly provided for in the African Charter while it is not explicitly provided for in any SADC instrument. In other words, the contention of the Court in Tanzania would carry some weight if there was an indication that the SADC instruments sought to go further than the African Charter. But, to the contrary, the SADC instruments provide for even less since they do not, in any of the cited instruments, contain an express provision on the right of individual access to courts, let alone international courts.

\textsuperscript{32} Van Zyl & Others v The Government of the Republic of South Africa & Others 2008 (3) SA 294 (SCA).

\textsuperscript{33} Swissbourgh Diamond Mines & Others v The Kingdom of Lesotho, Permanent Court of Arbitration Case-2013-29, Partial Final Award on Merits and Jurisdiction, 18 April 2016 (the judgment remains confidential but is on file with the author).

\textsuperscript{34} In the interest of transparency, I state that I served as an expert witness in the arbitration, focusing on the rules of State responsibility under international law and the decision-making processes in SADC, providing both a written report and being cross-examined by counsel for Swissbourgh. In putting together this section, I have not included any confidential material that is not readily available.

\textsuperscript{35} Swissbourgh Diamond Mines v Lesotho (note 33 above).
one dissenting opinion came from a former South African judge of appeal, Judge Nienaber. The Arbitral Tribunal took a similar decision to that adopted by the Constitutional Court. However, since the arbitration was held under the PCA rules, the decision was not final, and the courts of Singapore had jurisdiction to review the arbitration award. Lesotho had argued, inter alia, that the Arbitral Tribunal had not had jurisdiction precisely because its participation in the decision-making process did not establish its international responsibility. In other words, Lesotho had argued that its participation in the impugned SADC decisions was not unlawful. After an earlier high court judgment in Singapore had affirmed Lesotho’s arguments, Singapore’s Court of Appeal, also affirmed Lesotho’s argument and finally overturned the arbitral award on the basis, inter alia, that the participation of Lesotho in the SADC decisions did not breach the relevant rules of international law.

Thus, two decisions handed down under international instruments — the Singapore judgment, though handed down by a national court, counts as one under an international instrument since its jurisdiction derived from the PCA rules — determined that participation in the SADC decisions did not violate the right of access to the courts. It is, thus, a surprise that the Constitutional Court, as a court whose jurisprudence is renowned for being ‘international law-friendly’, did not even mention, let alone consider the interpretation of these courts on the position in international law. At any rate, since these decisions themselves are not binding, it is necessary to independently evaluate whether the President’s participation in the SADC decisions violated the right of access to the courts. I first consider whether the SADC decisions breached any rule of international law and then proceed to consider whether, if there had been a breach of an international law rule, such a breach can be attributed to the South African government.

B  Do the decisions breach a rule of international law

1  General

It is important to begin this analysis by making explicit a fact which might be obvious: an act is unlawful under international law if it breaches a rule under international law. An act is not unlawful under international law merely because it violates a rule of domestic law. Thus, the assessment of the lawfulness of an act under international law must be determined on the basis only of international law and not on the basis of domestic law. In this respect, the International Law Commission (ILC) has made the following observation:

[T]he characterisation of a given act as internationally wrongful is independent of its characterisation as lawful under the internal law of the State concerned. There are two elements to this. First, an act of a State cannot be characterised as internationally wrongful unless it constitutes a breach of an international obligation, even if it violates a provision of the State’s own law. (Emphasis added)

It is important to make this point explicitly in order to exclude the arguments that the decisions of SADC Summit were contrary to international law under the South African Constitution — whatever such an assertion might mean. The decisions of the SADC Summit are either lawful under international law or unlawful under international law. Domestic

36  Ibid.


38  Para 1 of the commentary to art 3 of the Articles on State Responsibility (note 25 above).
law plays no role whatsoever in the determination of the lawfulness of the decisions under international law.

The judgment of the Court in the SADC Tribunal case presupposes that there is, under international law, a right of access to justice that has been breached by the impugned decisions. Indeed, at several places, the Court points to the way in which the decision removed the rights of nationals of South Africa and the region to have access to courts. For example, early on in the judgment the Court stated that the ‘only avenue open to those [in Zimbabwe] aggrieved by having been deprived of their land in that constitutionally sanctioned manner was the Tribunal.’\(^{39}\) The Court then stated that the ‘President, together with leaders of other SADC [states], decided to eviscerate the possibility of States ever being held to account for perceived human rights violations, non-adherence to the rule of law or undemocratic practices.’\(^{40}\) More directly, according to the Court, the President was therefore ‘party to denying citizens of South Africa and other SADC countries access to justice at a regional level in relation to their disputes including those relating to human rights, democracy and the rule of law.’\(^{41}\)

All these assertions were made before any analysis of the content of the right or the nature of the breach. More importantly, the denial of access to justice is, as the Court itself observed, accurate only to the extent that it related to ‘justice at a regional level’. The fact is that for most States in the region, certainly for South Africa, the right of access to justice is already guaranteed under domestic law. In South Africa, the Constitutional Court itself is the pinnacle of a system that guarantees the right of access to justice. While there may be some States in the region that do not have similarly strong constitutional democracies, with a strong court system, this is not as a result of the impugned decisions of SADC. The claim underpinning the Court’s conclusion must therefore be that there is, under international law, a right of access to justice in the form of international or regional courts. But what is the source of this right? There are at least two possible sources of such a right and these are discussed below. The obvious source, and the one apparently relied on by the Court, is that such a right exists under the SADC Treaty and was taken away by the impugned decisions. Although not advanced by the Court, it is worth pointing out that the right of access to justice may also potentially be based on other treaty regimes, for example the African Charter and the International Covenant on Civil and Political Rights (ICCPR).\(^{42}\) Although it might be argued that the right of access to justice through international tribunals may also exist under customary international law, such

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\(^{39}\) SADC Tribunal + at para 11 (emphasis added).

\(^{40}\) Ibid at para 14 (emphasis added).

\(^{41}\) Ibid at para 15. See also para 31, where the Court stated that South Africa’s participation in the decisions ‘signified that access to justice, a commitment to the rule of law and the promotion of human rights would no longer be a paramount feature of our national vision and international relations.’

\(^{42}\) These two treaty regimes, which all the SADC members are party to, are highlighted simply for illustrative purposes since space does not permit the consideration of all treaties that may contain such a right.
a claim would be hard to substantiate. I have not been able to find any practice accompanied by *opinio juris* supporting such a claim.\(^{43}\) It is therefore to the treaty bases that I turn.

2 **A right of access to international courts under international human rights treaties**

For the sake of convenience, I begin with the possible basis for a right of access to justice through international courts being in the other treaty regimes such as the African Charter and the ICCPR. As noted above, the African Commission has already determined that the rights relevant to access to justice in the African Charter, namely art 7 (access to justice) and art 26 (independence of the courts), apply to national courts and not to international courts.\(^{44}\) The same situation holds true under the ICCPR. Article 14 of the ICCPR provides that ‘everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law’. The Human Rights Committee, the body established to interpret the ICCPR, has also used domestic law-related concepts in its statements about the content of the right.\(^{45}\) It has, for example, noted that the guarantee in art 14 —

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\(^{43}\) Draft Conclusion 2 of Draft Conclusions on the Identification of Customary International Law, *Report of the International Law Commission, Seventieth Session*, General Assembly Official Records (A/73/10) (‘To determine the existence and content of a rule of customary international law, it is necessary to ascertain whether there is a general practice that is accepted as law [*opinio juris*]’). In the commentary to this draft conclusion, the Commission states, for example, that ‘Draft conclusion 2 sets out the basic approach, according to which the identification of a rule of customary international law requires an into two distinct, yet related questions: whether there is a general practice, and whether such general practice is accepted as law (that is, accompanied by *opinio juris*).’ The commentary relies on the normal case law of the International Court of Justice that is referred to in the standard international law textbook on the subject of sources which need not be repeated here.

\(^{44}\) Luke Munyandu Tembani, *decision* (note 29 above) at paras 139, 144, 146.

\(^{45}\) Human Rights Committee, General Comment No 32, ‘Art 14: Right to equality before courts and tribunals and to a fair trial’ CCPR/C/GC/32 (August 2007). At para 4, e.g. the Human Rights Committee notes ‘that it cannot be left to the sole discretion of domestic law to determine the essential content of Covenant guarantees’. Needless this question is only relevant in the context of domestic application. See also para 9, which states: ‘The right of access to courts and tribunals and equality before them is not *limited to citizens of States parties*, but must also be available to all individuals, regardless of nationality or statelessness, or whatever their status, whether asylum seekers, refugees, migrant workers, unaccompanied children or other persons, who may find themselves in the territory or subject to the jurisdiction of the State party’ (emphasis added). See also para 10, which states: ‘The availability or absence of legal assistance often determines whether or not a person can access the relevant proceedings or participate in them in a meaningful way. While art 14 explicitly addresses the guarantee of legal assistance in criminal proceedings in paragraph 3 (d), *States are encouraged to provide free legal aid in other cases, for individuals who do not have sufficient means to pay for it.*’ (Emphasis added). See also para 18, which states: ‘The notion of a ‘tribunal’ in article 14, paragraph 1 designates a body, regardless of its denomination, that is established by law, is independent of the executive and legislative branches of government or enjoys in specific cases judicial independence in deciding legal matters in proceedings that are judicial in nature’ (emphasis added); and the ‘failure of a State party to establish a competent tribunal to determine such rights and obligations or to allow access to such a tribunal in specific cases would amount to a violation of article 14 if such limitations are *not based on domestic legislation*, are not necessary to pursue legitimate aims such as the proper administration of justice, or are based on exceptions from jurisdiction deriving from international law such, for example, as immunities, or if the access left to an individual would be limited to an extent that would undermine the very essence of the right.’ (Emphasis added).
not only applies to courts and tribunals addressed in the second sentence of this paragraph of article 14 but must also be respected whenever *domestic law* entrusts a judicial body with a judicial task.46 (Emphasis added)

The texts of other international instruments seem to confirm that, as a general matter, the right of access to courts refers to domestic courts and not to international courts and tribunals. Article 8 of the Universal Declaration of Human Rights is instructive in this respect. It provides that everyone ‘has the right to an effective remedy by the competent national tribunals for acts violating the fundamental rights’. Similarly, art 13 of the European Convention provides for the right to an ‘effective remedy before a national authority’. Thus, the right of access to courts is generally viewed in international instruments as being applicable to domestic courts and processes and not to international courts and tribunals. This does not mean that such international courts cannot exist, but when they do, they exist not as a fulfilment of a right of access to courts under general international law but rather as a voluntary choice of the parties establishing such courts, i.e. a treaty rule which, subject to the rules of the treaty, can be done away with.

3  *A right of access to international courts in the SADC Treaties*

While the African Charter and the ICCPR do not catalogue a right of access to international courts, an argument can be made that the SADC Tribunal itself provides for such a right and that the impugned decisions are in breach of the treaty obligations implied by the right in the SADC Treaty. There are potentially two distinct but related arguments in support of the contention that there is a right of access to international courts under the SADC Treaty. The first argument could be based on arts 4(c) and 6(1) of the SADC Treaty that relate to human rights, democracy and the rule of law, and the duty not to jeopardise the fulfilment of SADC’s principles. While the Constitutional Court did not rely on this ground, the Tribunal in the *Swissbourgh* arbitration matter did. The second argument, and the one relied upon by both the Constitutional Court and the court in *Swissbourgh* in its arbitral proceeding against Lesotho, is that since the SADC Treaty provides for a right of individuals to access the Tribunal, such a right can only be taken away by procedurally correct amendment of the Treaty. The first argument presupposes a fundamental right which would require more than a technical amendment of the provisions dealing with the Tribunal, while the second is less fundamentalist in nature and sees the right in question as a mere treaty obligation subject to the normal amendment provisions of the relevant instruments. I now turn to the first, more fundamental, argument.

Article 4(c) of the SADC Treaty provides that ‘SADC and its Member States shall act in accordance with […] human rights, democracy and the rule of law.’ Relying on the famous *Campbell* decision of the SADC Tribunal,47 it may be tempting to argue that art 4(c) of the SADC Treaty sets forth a right of individuals for access to international courts, and a corresponding duty on SADC member States to provide such access. Yet, by its clear terms, the *Campbell* decision was concerned with the rule of law at the national level, the availability

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46 Ibid at para 7. See also para 16 in which “suit at law” or its equivalents in other language texts is based on the nature of the right in question rather than on the status of one of the parties or the particular forum provided *by domestic legal systems* for the determination of particular.’ (Emphasis added).

47 *Campbell v Zimbabwe* (note 10 above).
of domestic remedies and the right of access to domestic courts. Campbell does not, under even the most generous reading, stand for the proposition that art 4(c) establishes a right of access to international courts and tribunals.

An application of the rules of interpretation similarly leads to the conclusion that art 4(c) does not establish a right of access to international courts. The general rule of interpretation, contained in art 31 of the Vienna Convention, requires that the terms of a treaty be given their ordinary meaning, in context and in the light of the treaty’s object and purpose. Article 31 of the Vienna Convention is generally accepted as customary international law and as being applicable to the interpretation of treaties by South African courts. The Constitutional Court has, itself, in SADC Tribunal judgment confirmed that many provisions of the Vienna Convention apply in South Africa as part of customary international law. It is these rules that must be applied to determine whether art 4(c) of the SADC Treaty establishes a human right of access to the courts.

First, the ordinary meaning of the terms of art 4(c), namely the promotion of the rule of law, do not indicate a right of access to the courts, let alone that such a right requires the existence of international or regional courts. Second, the context of the terms in art 4(c) indicates that it does not establish a right of access to courts, let alone international or regional courts. Article 4(c) is contained in the section of the treaty dealing with principles that should guide State conduct. Those principles do not, in and of themselves, establish content specific obligations, but rather spell out general principles which should guide the parties. I should pause to note this is not the same as saying these provisions are not binding, for surely they are. But they are ‘binding’ not in the sense of a hard and fast rule. Nor does it mean that all provisions contained in principles section of a treaty do not create binding obligations. Ultimately, it depends on the language used. Often, as is the case with art 4(c), principles governing a treaty are formulated in

48 Ibid at 16, where the issue related to access to courts is described as follows: ‘whether or not the Applicants have been denied access to the courts in Zimbabwe.’ (Emphasis added). In its lengthy and generally accurate analysis at 26–41, the SADC Tribunal in Campbell does not assess whether there is a right of access to courts internationally, but rather assesses whether Zimbabwean law, which deprives persons of the right of access Zimbabwean courts in connection with the land restitution programme, was a violation of the right of access to courts.

49 Article 31(1) of the Vienna Convention on the Law of Treaties provides as follows: ‘A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose’.

50 The 2018 International Law Commission Draft Conclusions on Subsequent Agreements and Subsequent Practice in Relation to the Interpretation of Treaties, draft conclusion 2. See for the view that the customary international law rule embodied in art 31 of the Vienna Convention on the Law of Treaties is applicable in South African courts, Tladi (note 1 above) 714.

51 SADC Tribunal (note 5 above) para 36 et seq.

52 R Dworkin Taking Rights Seriously (1977) at 20 notes that principles, unlike rules, do not operate ‘in an all or nothing fashion’, noting rather that they are to be ‘taken into account [...] as a consideration inclining in one way or another.’

53 D Tladi Sustainable Development in International Law: An Analysis of Key Enviro-Economic Instruments (2007) at 101–102 argues that sustainable development, relying on Dworkin’s distinction between rules and principles to argue that sustainable development, though flexible, is, indeed, a binding principle of international law (‘If Lowe’s objection to sustainable development as a (traditional) principle of international law hinges on the uncertainty regarding its application, its flexibility or lack of fixed content (as I think it does), then the objection can be overcome by a distinction made famous by Ronald Dworkin. Certainly because of flexibility, sustainable development cannot be a rule [...] That does not mean, as I think Lowe’s contribution may imply, that the application of the principle of sustainable is an elective’).
broad and general terms, not specifying specific obligations, but general principles relevant for the application of the treaties. Furthermore, as part of context, art 16 of the SADC Treaty has detailed provisions addressing some of the fundamental features of the, at that stage, yet-to-be-established Tribunal. In none of these provisions is the right of individuals to have access to the Tribunal mentioned, suggesting that such a right does not flow from art 4(c) of the Tribunal. Finally, it should be recalled, as part of object and purpose analysis, that the SADC Treaty is not a human rights treaty. Rather, it is a constitutive treaty of an international organisation, providing for regional integration and requiring its members to ensure the protection of human rights, democracy and the rule of law in order to promote regional integration. It does not specify how this should be done, and certainly does not, on its terms, require the establishment of a right of access to international courts. Out of more than thirty arts, only one makes any reference to human rights, and it does so in broad terms without any detail. Not a single individual human right that is customarily contained in human rights treaties is referred to. Moreover, under art 31(3)(c) of the Vienna Convention other rules of international law are to be taken into account in the interpretation of treaties. The general rules of international law described above, including under the African Charter and the International Covenant on Civil and Political Rights, contribute to the conclusion that art 4(c) of the SADC Treaty does not establish a right of access to international courts which was breached by the impugned decisions of the SADC Summit. None of these factors are individually determinative of the interpretation. All of them taken together indicate that art 4(c) does not establish a right of access to international or regional courts.

Although the Constitutional Court referred to art 4(c) of the SADC Treaty, the Court did not rely on it. Instead, the Court seemed to rely on a rather technical argument concerning amendment procedures. It correctly noted that the Protocol of 2000 establishing the SADC Tribunal (2000 Protocol) was an integral part of the SADC Treaty. According to the Court, the adoption of the new 2014 Protocol was unlawful because ‘the [SADC] Treaty has never been amended so as to repeal its provisions relating to individual access to the Tribunal, human rights, the rule of law and access to justice’. In the view of the Court, the jurisdiction of the Court could only be ‘lawfully tampered with in terms of the provisions of the [SADC] Treaty that regulate its amendment’. While the Court assumed that, because the Protocol was an integral part of the Treaty, it could only be ‘tampered with’ in accordance with the rules of the SADC Treaty, the 2000 Protocol had its own amendment procedures and, as the lex specialis, it

54 For example, art 3 of the UN Framework Convention on Climate Change. As an example of a section in treaty containing principles, which does, based on the formulation of its terms, contain hard obligations is art 2 of the Charter of the United Nations.
55 Article 31(3)(c) provides that in, addition to context ‘any relevant rules of international law’ shall be taken into account in the interpretation of treaty.
56 In contrast, the High Court of Tanzania in Tanganyika Law Society (note 6 above) did rely on art 4(c) (at 42–48). While comprehensive, at least in terms of the length of analysis, Tanganyika did not engage in the interpretation of the SADC Treaty and did not rely on any of the recognised tools of interpretation as discussed above, i.e. ordinary meaning, context and object and purpose, the Court simply stated that it was ‘not in agreement’ with the argument that the right of access to courts applies to national courts (at 42) but offered little in the way of application of the methodology of international law to substantiate its claim. To give an example, while the Court stated, at 43, that the SADC Treaty ‘entrenches human rights and the rule of law’, it did not explain why this must mean access to an international court.
57 SADC Tribunal (note 5 above) at para 53.
58 Ibid at para 49.
is the amendment procedure in the Protocol that would apply.\textsuperscript{59} This oversight by the Court is, however, immaterial since under both the SADC Treaty and the 2000 Protocol amendments are to be adopted by a two-thirds majority of the parties.\textsuperscript{60} Similarly, while the Court focused solely on amendments, it did not consider the possibility that legally what had occurred was not an amendment but a dissolution of the old Tribunal and the creation of a new Tribunal by means of a new Protocol which, once it enters into force, would terminate the previous one.\textsuperscript{61} From a procedural perspective, this distinction is, however, too immaterial since dissolution also required a two-thirds majority.\textsuperscript{62}

While the Court seemed convinced that the Protocol had not been duly amended, nowhere in the judgment was this position tested. The Court simply asserted that the 2000 Protocol was never amended (or properly amended). At least at face value, since a formal decision had been contained in a resolution to disband the SADC Tribunal with a subsequent decision to adopt a new one, the Court ought to have made a determination as to whether these decisions, contained in formal resolutions, were somehow procedurally defective. (I leave outside of this assessment the decisions not to renew the mandates of the judges, since in the final analysis those decisions did not have lasting legal effect.)

It is useful to refer to Tanganyika Law Society here since it addressed the relationship between the 2000 and 2014 Protocols. The Tanganyika Court’s assessment of the legal relationship between the two protocols establishing the Tribunal, i.e. 2000 and 2014 Protocols, was concerned with whether the latter has entered into force, noting that to date, only ‘nine States had signed the Protocol’.\textsuperscript{63} This concern, however, is immaterial to the lawfulness of the decision and goes only to the effectiveness of the Protocol. Treaties, particularly multilateral treaties, do not generally become effective, or enter into force, immediately. Indeed, the High Court of Tanzania determined, on this basis that ‘until ratification of the “new SADC Tribunal Protocol” by Parliament, the existing Tribunal is still valid.’\textsuperscript{64} This position, which to my mind is legally defensible, does not, at all, impact on the question of the legality of adoption of the 2014 Protocol.

It is the case that at various places the Court makes the assertion that the relevant treaties were not duly amended because it could only be amended by a three-quarters majority. Having stated that the jurisdiction of the SADC Tribunal may only be lawfully altered on the basis of the SADC Treaty amendment procedures, the Court stated that instead of a ‘three quarters majority’, the Summit ‘sought to amend the Treaty through a protocol, thus evading

\textsuperscript{59} Article 37(3) of the 2000 Protocol.

\textsuperscript{60} Article 36(1) of the SADC Treaty provides that an amendment of the treaty ‘shall be adopted by a decision of three-quarters of all members of the Summit’. Article 37(3) of the 2000 SADC Protocol states that an ‘amendment to this Protocol shall be adopted by a three (3) quarters of all the members of the Summit.’ Moreover, the SADC Treaty provides that Art 22(11) provides that ‘[a]n amendment to any Protocol that has entered into force shall be adopted by a decision of three-quarters of the Member States that are Party to the Protocol.’

\textsuperscript{61} The Malawi High Court in Tanganyika (note 6 above) at 26, correctly acknowledged this process. According the Court in Tanganyika this was not helpful to the government of Tanzania only because the 2014 Protocol had not yet entered into force.

\textsuperscript{62} For example, art 35 of the SADC Treaty (‘The Summit may decide by a resolution supported by three-quarters of all members dissolve SADC or any of its institutions’).

\textsuperscript{63} Tanganyika (note 6 above) at 28.

\textsuperscript{64} Ibid at 29.
compliance with the Treaty’s more rigorous threshold of three-quarters of all of its Members.\textsuperscript{65} Yet nowhere did the Court actually embark on an interpretation of the relevant provisions to determine the requirements for amendment or dissolution. The Court stated, without more, that the decision of SADC ‘evidences a failure to adhere to the provisions or proper meaning of the Treaty’,\textsuperscript{66} without applying the methodology for treaty interpretation under international law. Nowhere did the Court assess whether the process by which the 2014 Protocol had been adopted was consistent with the interpretation of the relevant treaty provisions. In fact, the Court did not even describe the process by which SADC arrived at its decision. The closest the Court came to contrasting the process used by the SADC Summit and the requirements under the SADC treaties was to draw a distinction between the three-quarters requirements and what it referred to as ‘the protocol route’\textsuperscript{67} The Court never told us what it meant by the ‘protocol route’ except that it required ‘the support of ten members’.\textsuperscript{68} But if the ‘support of ten members’ is a lower threshold does the fact that the resolutions themselves were adopted by consensus, which could be interpreted as unanimity, not meet the higher threshold of two-thirds? And has SADC adopted any of its decisions by this ‘support of ten members’ threshold in the past?\textsuperscript{69} These questions are all, for reasons I describe below, relevant to proper interpretation and none of them have been discussed.

The relevant treaty provisions under which the decisions could have been adopted, i.e. SADC Treaty and the 2000 Protocol, all have in common that any amendment — and for that matter dissolution of SADC Institutions — should be adopted by a resolution of a two-third majority. The resolutions under which all decisions under consideration were taken — and indeed the resolutions under which all SADC decisions are taken — were taken not by recorded vote but by consensus. It may thus well be argued that by adopting the relevant decisions by consensus, and not by two-thirds majority, the Summit acted contrary to the SADC Treaty and the 2000 Protocol — perhaps this is the basis of the Court’s conclusion. The question would thus be whether consensus is inconsistent with a two-thirds majority or whether consensus can be read into the amendment or dissolution procedures under the SADC Treaty.

The requirement for a two-thirds majority in the various provisions is not necessarily inconsistent with consensus decisions.\textsuperscript{70} Consensus decisions, like decisions by a two-thirds majority, indicate substantial support for a decision. In some instances, a decision by consensus

\textsuperscript{65} SADC Tribunal (note 6 above) at para 49. See also at para 52 (‘More importantly, the Tribunal is an institution of SADC and the Treaty requires a “resolution supported by three-quarters of all members to dissolve […] any institution”’).

\textsuperscript{66} Ibid at para 51.

\textsuperscript{67} Ibid at para 49 (‘And it cannot be properly be amended in terms of a protocol. It may only be amended by three-quarters of the SADC Member States. The Summit, however, sought to amend the Treaty through a protocol, thus evading compliance with the Treaty’s more rigorous threshold of three-quarters of all its Member States.’).

\textsuperscript{68} Ibid.

\textsuperscript{69} For the view that the ‘protocol route’ requires only the support of ten members, the Court refers to art 53 of the Protocol. However, the 2000 Protocol does not have an art 53. The 2014 Protocol, which does have an art 53, could not be the basis for the decision for its adoption since it had not (and still has not) entered into force at the time of its adoption. Moreover, art 53 of the 2014 Protocol does not deal with adoption of amendments but rather with its own entry and, at any rate, also requires a two third-majority for its entry into force (‘This Protocol shall enter into force thirty (30) days after the deposit of the Instrument of Ratification by two-thirds of the Member States.’).

\textsuperscript{70} The meaning of consensus was discussed in a now famous report by Lorand Bartels Final Report of the Review of the Role, Responsibilities and Terms of Reference of the SADC Tribunal of March (2011).
may even indicate unanimous support. In this respect, the Bartels report on the SADC Tribunal has stated that the consensus rule in SADC instruments means that ‘normally, any SADC Member State can veto a Summit decision’. This would seem to suggest, contrary to the import of the Constitutional Court’s view, that consensus is more onerous than a two-thirds majority since it would require the support, or at least acquiescence, of all 15 members. Yet from a purely technical, literal reading of the two-thirds majority requirement, an argument can be made that any decision to amend (or dissolve) an institution under the SADC instruments has to be by a two-thirds majority, and that a consensus decision, even if indicating a larger level of support, does not meet this technical requirement. Here, the customary international law rules on interpretation, contained in art 31 of the Vienna Convention, play an important role. Article 31(3)(b), also accepted as reflecting customary international law, provides that when interpreting treaty provisions ‘subsequent practice in the application of the treaty’ shall be taken into account. As the ILC has noted, subsequent practice under art 31(3)(b) ‘may serve to clarify the meaning of a treaty by narrowing, widening or otherwise determining the range of possible interpretations, including any scope for the exercise of discretion which the treaty accords to the parties.’ Thus subsequent practice under the Vienna Convention would help clarify whether consensus may be relied upon when amending the Protocol.

Perhaps the most well-known example of the effect of subsequent practice on treaty interpretation concerns the exercise of the so-called ‘veto’ by the permanent members of the UN Security Council (UNSC) under the UN Charter. Under art 27(3) of the UN Charter, decisions of the UNSC on substantive matters require the ‘concurring votes of the permanent members’. Technically, a literal reading of this provision would mean that an abstention by a permanent member would be regarded as a ‘veto’ since an abstention is hardly ‘concurrence’. Yet, in the practice of the UN, decisions of the UNSC have been accepted as validly adopted even in the face of abstentions by permanent members. The International Court of Justice (ICJ) relied on this subsequent practice ‘extending over a long period’ to reject apartheid South Africa’s argument that the UNSC resolution requesting the Court’s advisory opinion on the lawfulness of the application of apartheid in Namibia had not been validly adopted since two members of the UNSC, the United Kingdom and the USSR, had abstained. Thus, the practice of SADC in its decisions should guide any interpretation concerning the procedures for the adoption of decisions.

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71 Ibid at 127.
72 The report does add a cautionary note that consensus, under the law of international organisations, means ‘adoption without formal opposition’, ibid. I am in agreement with this more cautious discussion. For the record, in my own report to the arbitral panel, I argued that consensus did not mean unanimity but was a much more complex concept. For the purposes of these articles, not much turns on that rather lengthy analysis, so I will not reproduce those arguments.
73 Article 31(3)(b) of the Vienna Convention on the Law of Treaties.
74 ILC Draft Conclusions on Subsequent Agreements and Subsequent Practice (note 50 above) Draft Conclusion 7.
75 Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) Notwithstanding UN Security Council Resolution 270(1970), Advisory Opinion, ICJ Reports (1971) at 21, para 22 (‘However, the proceedings of the Security Council extending over a long period supply abundant evidence that presidential rulings and the positions taken by members of the Council, in particular its permanent members, have consistently and uniformly interpreted the practice of voluntary abstention by a permanent as not constituting a bar to the adoption [...] This procedure followed by the Security Council, which has continued unchanged [...] has been generally accepted by Member of the United Nations and evidences a general practice of the Organisation.’).
As a practical matter, SADC adopts decisions by consensus, even where a particular threshold is required. This practice is also apparent from the decisions of SADC Summits. As mentioned above, amendments to the SADC Treaty and the 2000 Protocol, for example, are to be amended by a three-quarter majority. Yet, in the Decisions of SADC on the several amendments of these two instruments, there is no record of a vote, only that Summit ‘approved and signed’. This constitutes subsequent practice that the Court ought to have taken into account in determining whether amendments can be effected by means of consensus. It is worth mentioning that the Constitutional Court itself, in *Zimbabwe v Fick*, accepted without question the amendment to art 16 of the SADC Treaty (concerning the Tribunal), even though that amendment was adopted by consensus and not by a recorded vote. All of this indicates that there is a settled practice, over an extended period of time, in which SADC member States have made decisions by consensus, even where the requisite treaty provides for a threshold of two-third majority. This would indicate that the impugned decisions were adopted consistently with the ‘authentic’ interpretation of parties to the SADC instruments. As such the Constitutional Court’s determination that the impugned decisions were a breach of the SADC Treaty without taking into account subsequent practice of the parties, as required by art 31(3)(b) of the Vienna Convention, is questionable at best. As Hafner has noted, once a subsequent practice under 31(3)(b) is established, ‘it cannot be set aside as not having the slightest legal effect’.

In addition to not considering the role of subsequent practice, the Court also failed to consider that adopting a new treaty, even one inconsistent with a previous treaty is not unlawful under international law. As a general matter, rules of international law, including treaty rules, are *jus dispositivum* and can be derogated from or modified by subsequent rules of international law. This includes treaty rules concerning access to courts and certainly includes rules of amendments. The only exception to this basic rule of international law is the operation of

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76 For example, para 8.2.4.1 of the Records of the Summit Decision of August 2007 amending the Tribunal Protocol to ‘facilitate trade disputes in the SADC Region’; Decision 6 of the Records of the Summit Decision of August 2008 amending the Treaty to provide for two Deputy Executive Secretaries and the abolition of the Integrated Committee of Ministers; Decision 10 on the Amendment of Article 6 of the Tribunal Protocol; Summit Decision 15 on the amendment of SADC Treaty so as not to provide for a specific number of Deputy Executive Secretaries.

77 *Zimbabwe v Fick* (note 10 above) at para 10 (‘The amendment alluded to above was effected by the Summit in terms of the Agreement Amending the Treaty of the Southern African Development Community (Amending Agreement). Article 16(2) of the Treaty was amended to provide for the Tribunal Protocol to be an integral part of the Treaty, obviously subject to the adoption of the Amending Agreement’). See art 18 of the 2001 Agreement Amending the Treaty of the Southern African Development Community. The Agreement was adopted on 14 August 2001. See Communiqué of the SADC Summit of 2001 August, Malawi Blantyre, para 23.

78 Draft conclusion 3 of the ILC Draft Conclusions on Subsequent Agreements and Subsequent Practice (note 50 above) (‘Subsequent agreements and subsequent practice under article 31, para 3 (a) and (b) [of the Vienna Convention], being objective means evidence of the understanding of the parties as to the meaning of the treaty, are authentic means of interpretation, in the application of the general rule of treaty interpretation in article 31.’).

79 G Hafner ‘Subsequent Agreement and Practice: Between Interpretation, Informal Modification and Formal Amendment’ in G Nolte (ed) *Treaties and Subsequent Practice* (2013) 120.

peremptory norms of general international law (jus cogens). It is clear that the Court does not believe that the right of individual access to the SADC Tribunal is a peremptory norm since it accepts that the provisions could have been amended through the correct procedure. Nor does the Court assert that the amendment provisions themselves are of a peremptory character. This being the case, the normal rules of successive treaties laid out in the Vienna Convention would, even if in the absence of the application of art 31(3)(b), be relevant. Article 59 of the Vienna Convention provides for the termination of one treaty by entry into force of another if ‘it appears from the later treaty or is otherwise established’ that the parties to the previous treaty intend for it to be replaced. This rule is not subject to the provisions of the previous treaty. The 2014 Protocol is explicit that the 2000 Protocol ‘is replaced with effect from the date of entry into force of’ the 2014 Protocol. Even though the 2014 Protocol has yet to enter into force, it is hard to imagine how the adoption of a subsequent treaty repealing an old treaty — a scenario contemplated by the Vienna Convention — could be unlawful. At any rate, the problem with the Court is not only its conclusion but also its failure to engage with the methodology of international law by addressing this and other rules of interpretation.

4 There is no rule of international law that is breached by the SAD decisions

From the analysis above, several points can be made. First, there is no obligation under general international law for States to provide access to international courts and tribunals. Second, the general human rights principles in the SADC Treaty do not contain a right of access to international courts, whether by the ordinary meaning of the terms of those principles or in the application of other means of interpretation. Third, the impugned decisions were adopted pursuant to the relevant SADC treaties as interpreted through practice by the parties to those treaties. Fourth, whatever the outcome of the interpretation of the provisions under the existing SADC treaties, the 2014 Protocol constitutes a later treaty with the effect, once it enters into force, of terminating the 2000 Protocol. The conclusion from all of this is that the impugned decisions, in particular the President’s decision to adopt and sign the 2014 Protocol, did not breach any rule of international law as asserted by the Constitutional Court in the SADC Tribunal decision.

As a matter of international law, this should be the end of the analysis. If a breach of a rule of international law cannot be established, the SADC Tribunal judgment should fall on its head. Nonetheless, for completeness’ sake and in order to cover all bases, I turn now, albeit very briefly, to the second element of the responsibility, namely attribution.

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82 Article 59 of the Vienna Convention on the Law of Treaties (‘A treaty shall be considered terminated if all the parties to it conclude a later treaty relating to the same subject and [it] appears from the later treaty or is otherwise established that the parties intended that the subject matter be governed by that treaty’).
83 Ibid.
84 Article 48 of the 2014 Protocol.
85 Tanganyika (note 6 above) at 26.
C Are the decisions attributable to the South African Government

The SADC Tribunal judgment did not only assert that the SADC breached its international law; it also asserted that, on the basis of the unlawful decisions of SADC, South Africa (or its President) acted contrary to its international law obligations. For this assertion to stand, it has to be shown, that the decisions of SADC can be attributed to the South African government.

The point of departure for addressing South Africa’s responsibility for the conduct of SADC is that SADC is an international organisation with international legal personality. It is, thus, responsible for its own acts. In the Reparations for Injuries Advisory Opinion, the ICJ stated that one of the consequences of independent legal personality is that the international organisation “occupies a position in some respects in detachment from its Members.” Thus, a State does not automatically assume responsibility for the decisions of an organisation, including the decision that it may have positively voted in favour of. I leave aside, for now, that South Africa did not positively vote for the decisions in question. The Articles on State responsibility set out specific circumstances, none of which apply to the SADC decisions, under which an act may be attributed to a State. For example, art 4 provides that the acts of an organ of the State are attributable to the State. To be clear, and to avoid misunderstanding, it is the unlawful conduct in question to which these articles refer. Thus, for art 4, it is not sufficient that an organ of the South African State was present (or even engaged in some conduct). What would be required in this case is that the unlawful conduct, in this case the SADC decisions, can be classified as the conduct of the organ of the State. The articles provide three other grounds, equally inapplicable, for an act of another State to be attributable to a State. These are where the State in question directs, coerces and assists another State in the commission of a wrongful act. Leaving aside that these provisions are concerned with acts of other States and not of international organisations, none of them apply to the case at hand.

The ILC, in putting together this text, was well aware that there may be special considerations that apply in the case of attribution of the conduct of international organisations. Even so, the articles emphasise that an international organisation ‘possesses separate legal personality under international law’ and as such ‘is responsible for its own acts.’ The situation of an international organisation being responsible for its own acts is contrasted with that ‘where a

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86 Article 3(1) of the SADC Treaty.
87 Article 3 of the Articles on the Responsibility of International Organisations Yearbook of the International Law Commission vol II part II (2011) 46 (‘Every international wrongful of an international organisation entails the international responsibility of that organisation.’). See also Tanganyika Law Society (note 6 above) at 29.
88 Reparations for Injuries Suffered in the Service of the United Nations, Advisory Opinion of 11 April 1949, ICJ Reports (1949) 174 at 179. See also at 185.
89 Articles on State Responsibility (note 25 above) art 4 (conduct of an organ of the State), art 5 (conduct of persons exercising governmental authority), art 6 (conduct of organs placed at the disposal of the State), art 8 (conduct directed or controlled by the State), art 9 (conduct carried in the factual exercise of governmental authority even in the absence of official authority), art 10 (conduct of an insurrectional movement) and art 11 (conduct acknowledged by the State as its own).
90 Ibid art 17.
91 Ibid art 18.
92 Ibid art 16.
93 Ibid art 57. (“These articles are without prejudice to any question of the responsibility under international law of an international organisation, or of any State for the conduct of an international of an international organisation.”)
94 Ibid at para 2 of commentary to art 57.
number of States act together through their own organs’. It is in the latter case that the States themselves can be held responsible:

[W]here, a number of States act together through their own organs as distinct from those of an international organisation, the conduct in question is that of the States […].

In 2011, the ILC adopted the Articles on the Responsibility of International Organisations, in which the possibility of a State’s responsibility for the acts of an international organisation were considered. The general point of departure in those articles, as is the case in the Articles on State Responsibility, is that the State is responsible for its own conduct and not for the conduct of an international organisation of which it is a member. For example, a State may be responsible for aid or assistance given by it to an international organisation in the Commission of an internationally wrongful act by the organisation. The State would, in such a case, not be responsible for the unlawful conduct of the international organisation but for its own conduct in assisting the international organisation in breaching a rule of international law.

What is clear, however, is that the act of participating in the decision-making processes of an international organisation does not render the State in question responsible for the act of the international organisation. At any rate, and in keeping with the view that the State in question would be responsible for its own conduct, an assertion that a State is responsible for a position it has adopted within an international organisation would have to be justified, not on the basis of aid or assistance to an international organisation, but on the basis of the Articles on State Responsibility.

Even if the decisions of SADC were unlawful under international law, and there is little basis for that conclusion, it would be incorrect to conclude that the South African government was itself in breach of international law since the acts in question are not attributable to it. The conclusion that can be reached from this analysis is that, first, the decisions of SADC do not constitute an internationally wrongful act and, second, even if they did, they are not attributable to South Africa. As such it is incorrect to determine, as the Constitutional Court, did that the President breached international law by participating in the SADC decisions.

D Normative and other considerations

It seems clear that the Constitutional Court in delivering its judgment was motivated by normative concerns regarding the decision of SADC and the government’s failure to distance itself from it. Early on in the judgment, the Court stated that the ‘President, together with leaders of other SADC nations, decided to eviscerate the possibility’ of being held accountable for ‘perceived human rights violations, non-adherence to the rule of law or

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95 Ibid.
96 Ibid.
97 For example art 58 of the Articles on the Responsibility of International Organisations (note 87 above)
98 This much is made clear in the example given by the Commission to illustrate responsibility for aid or assistance: a State is responsible if it transfers nuclear weapons to an organisation prohibited from acquiring such weapons. See para 2 of commentary to art 58.
99 Commentary on art 58 ibid at para 4 (‘an act by a member State which is done in accordance with the rules of the organisation does not as such engage the international responsibility of that State for aid or assistance’).
100 Ibid at para 5 of the commentary to art 58 (‘Should a breach of an obligation be committed by a State in [its capacity as a member of an international organisation], the State would not incur international responsibility under the present article, but rather under the Articles on Responsibility of States for Internationally Wrongful acts.’).
undemocratic practices. More stingingly, the Court stated that South Africa was therefore ‘party to denying citizens of South Africa and other SADC countries access to justice at a regional level’. These normative concerns are valid and irreproachable. It is difficult to defend, normatively, the decision of SADC to disband the SADC Tribunal and replace it with a tribunal not having the competence to hear individual petitions. The decision is all the more indefensible (normatively), because, it appears, the underlying reason was to protect Zimbabwe from accountability for the human rights violations accompanying its land reform process.

The normative indefensibleness of the SADC’s decisions does not, however, translate to their unlawfulness under international law. These decisions have been questioned in both political and legal literature. Naldi and Magliveras pull no punches in decrying the decision:

The story of the SADC Tribunal is a shameful one. A feasible case can be made that in Mike Campbell the Tribunal engaged in inappropriate law making due to the rather limited references in SADC instruments pertaining to its human rights mandate. […] Irrespective of the validity of that argument, the fact remains that the Summit’s response was an overreaction which brought SADC no credit but merely called its integrity into question. The suspension of the Tribunal reveals an utter lack of understanding, or total cynicism and opportunism, among SADC leaders of the basic precepts of liberal democracy and good governance, the rule of law, the independence of the judiciary, and respect for human rights.

Yet, as strongly worded as the critique of the decisions by Naldi and Magliveras are, they do not suggest that the decisions were unlawful under international law for there is simply no basis for such a conclusion. Even Meckler, who seems positively disposed to the idea that the SADC decisions were unlawful, ultimately bases his criticism of SADC decisions on normative and political consideration and not on legal grounds. In the section titled ‘The Illegality of the Suspension and What the Future Holds’, the article refers to charges of illegality made elsewhere, but does not, itself, make an assessment of the legality nor come to any firm conclusions about the legality of the decisions, stating only that ‘many would argue “the legality of the purported suspension can be challenged.”’ This could hardly be a basis for defending the Court’s methodological approach to international law. Moreover, even the main article invoked by Meckler to support the contention of illegality does not seem

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101 SADC Tribunal (note 5 above) at para 14.
102 Ibid at para 15.
104 GJ Naldi & KD Magliveras ‘The New SADC Tribunal: Or the Emasculation of an International Tribunal’ (2016) 63 Netherlands International Law Review 133, at 156. See also Nkhata (not 103 above) 31 (‘Clearly, the decisions in pursuit of the dismantling of the Tribunal, and its actual dismantling, were all ‘political’ decisions borne out of a contrived political exigency within the region. There was no legal imperative justifying the dismantling of the Tribunal […] The result is that there is little room for a vibrant regional body to impartially and rigorously enforce common standards in such areas as human rights and democratic governance.’)
105 S Meckler ‘A Human Rights ‘Monster’ that Devoured No One: The Far-Reaching Impact of Dismantling the SADC Tribunal’ (2016) 48 New York University Journal of International Law and Policy 1007, especially 1038 (‘With the progress southern Africa has made in human rights over the past several decades, the dismantling of the SADC Tribunal that once had a human rights and individual access to the court is a serious step in the wrong direction.’)
106 Ibid at 1029 (emphasis added).
to support the conclusion of unlawfulness under international law.\textsuperscript{107} Although scathing in its criticism of the decision,\textsuperscript{108} the main argument advanced by Jonas is that the closure of the Tribunal has ‘blighted [SADC’s] good track record as an agent for democratisation and institution for human rights.’\textsuperscript{109} Notwithstanding that it has been quoted as a basis for questioning the legality of the Summit decisions, nowhere in the 38 page article does Jonas make any conclusions about the lawfulness or not of the decision and certainly the article does not undertake any legal analysis of the SADC instruments to determine consistency of the decisions with those instruments.

A second normative point is that the judgment of the Court is, in some ways, counter-intuitive and it, seems retributive. It is unclear what purpose, from a normative perspective, is served by requiring the President to withdraw his signature from the 2014 Protocol. This all or nothing approach — or cutting off your nose to spite your face — does not seem consistent with the desire to promote justice and the rule of law. The Court seems to be saying, you can either have justice the way we demand it or none at all! Surely some justice is better than none at all? Undermining the entry into force of the new Protocol is not, as a legal or political matter, going to bring back the old Tribunal with individual access. Why should neighbouring States in the SADC region lose a judicial forum to hold South Africa to account for, for example, its failure (assuming there is culpability) to prevent xenophobic attacks against their nationals? Why should the South African government, in the event that there are unlawful reprisals directed at South African nationals or South African owned enterprises by SADC States for the xenophobic attacks, not have a regional court to have its cause ventilated? Is it appropriate, normatively, for the Court to decide that if individuals cannot have this forum, then States will also not be entitled to have a forum? After all, the SADC treaty system is principally a regional integration project. Is the Court really making the policy determination that the principal aim should not be underpinned by a dispute settlement mechanism consistent with the principles of the UN,\textsuperscript{110} if it is not expanded to (another) human rights mechanism? Can SADC members not decide, as a policy matter, that having (and strengthening) the African Court is a better option than having (yet another) human rights court in the sub-region?

This latter point leads me to address a more sensitive aspect, which I am sure will not earn me brownie points. As a normative proposition, we should not forget that the SADC Treaty system is principally about enhancing regional integration. It is not a human rights system. The Campbell decision pushed the envelope, as courts tend to do, and attempted to turn it into one,


\textsuperscript{108} Ibid especially at 321 (‘Such palpably grotesque deviation from paths of accountability and virtue by the SADC leaders implicitly means that the principles of democracy, human rights and the rule of law in the region are not sacrosanct ethos for the “protection of the citizens, but merely irritating obstacles to the people who govern them.”’)

\textsuperscript{109} Ibid at 395.

\textsuperscript{110} Article 2(3) of the UN Charter.
this much is accepted even by detractors of the SADC Summit decisions.\footnote{Naldi & Magliveras (note 104 above) at 140 (‘The Tribunal [in its first ever judgment] was thereby proclaiming its activist credentials, making it evident that it was prepared to read non-enumerated rights into the SADC Treaty and to hold Member States to account. It is open to debate whether the Tribunal may have exceeded its mandate due to the non-elaborate provisions on the protection of human rights in the SADC instruments.’). See also F Cowell ‘The Death of the Southern African Development Community Tribunal’s Human Rights Jurisdiction’ (2013) 13 Human Rights Law Review 155, 164 who, having criticised severely the SADC decisions, states, ‘[y]et in relation to the Tribunal there is a need to contextualise what happened, as the operations of the Tribunal were hamstrung by its structural weakness and intensely fragile human rights mandate’ noting further that this weakness could ‘convince states that the Tribunal was overstepping its role even though the Tribunal had affirmed its human rights competence’. Cowell adds that the dispute between the members of SADC and the Tribunal could ‘at a political level’ — and I would add legal level — only ever be won by the States because ‘they alone could plausibly account for their intentions’. He concludes this line of thought by making the following observation about the Tribunal’s approach in the Campbell decision: ‘Given this, it is probably best to construct a somewhat narrower interpretation of the references to human rights.’ See also MJ Nkhata ‘The Role of Regional Economic Communities in Protecting and Promoting Human Rights in Africa: Reflections on the Human Rights Mandate of the Tribunal of the Southern African Development Community’ (2012) 20 African Journal of International and Comparative Law 87.} Indeed, even the Constitutional Court, while eager to have the SADC Tribunal hold the executive accountable for human rights violations, is quick to point out that it itself should be exempt from the Tribunal’s reach.\footnote{SADC Tribunal (note 5 above) at paras 59–60.} States, having determined that the treaty that they agreed to was being interpreted in a manner not intended by the body established to interpret it (SADC Tribunal), are entitled, as a matter of law and policy, whether through interpretative declaration, subsequent agreements, amendments or termination, to seek the result initially intended. Tribunals with the mandate to interpret treaties may have the final say in interpretation, but the makers of the treaties — the States — have other means at their disposal to ensure their voices are not lost. Progressive development of law takes place when there is a delicately balanced dance between States and the tribunals established by them. The establishment of tribunals does not mean that States lose all control over international law-making.

IV CONCLUDING REMARKS

The argument advanced in this article is unambiguous and makes no attempt at nuance: the determination by the Constitutional Court in the \textit{SADC Tribunal} judgment that the decisions of the SADC Summit constituted a breach of international law is wrong! There may well be, under constitutional law, a basis for finding the decision unlawful, but to the extent that any determination is dependent on international wrongfulness, such a determination cannot be justified, neither by the reasoning of the Court nor the methodology of international law. What is most troubling about the judgment, however, is not the conclusion that South Africa’s participation in the decisions was unlawful. What is most troubling about the judgment is the fact that there is no attempt — none whatsoever — to apply the methodology of international law in coming to the conclusions about the wrongfulness of the SADC decisions under international law and the wrongfulness of South Africa’s participation in those decisions. Ostensibly, the decision is based on the breach of a treaty text. Yet, there is not a single reference to the rules of treaty interpretation. At issue is the adoption of a treaty that conflicts with an earlier treaty, yet the rules of international law concerning the possible modification or even termination of treaties by later treaties is never alluded to, let alone analysed. This critique
of the judgment should not be interpreted as a defence of the SADC decisions. It is merely a call for faithfulness to the methodology of international law.
We Are All International Lawyers; Now What? Taking Seriously the Constitutional Injunction to Integrate International Law Obligations into South African Law

ANDREAS COUTSOUDIS & MAX DU PLESSIS

ABSTRACT: There is ‘no escape from the manifest constitutional injunction to integrate, in a way the Constitution permits, international law obligations into our domestic law.’ So proclaimed the Constitutional Court almost a decade ago. The article begins by summarising and analysing how the Constitutional Court and other courts have, in successive cases, drawn international law deeply into the fabric of South African law and the justiciable obligations of public officials. In so doing, the courts have breathed life into what we referred to as the Constitution’s international law trifecta. It is on this basis we claim that we are all international lawyers now. But lest those words appear no more than hollow rhetoric, this article considers how one ought to take seriously the Constitution’s inescapable integrative injunction. This is done by first reflecting on and delineating the principles flowing from the last ten years of international law jurisprudence. Having laid that foundation, the article then considers in more detail certain issues that the courts’ integrative endeavours have highlighted but remain to be resolved and reconciled. Finally, the article articulates and examines, now that we are all international lawyers, certain of the potential dangers to be avoided when interpreting and applying international law.

KEYWORDS: customary international law, international agreements, SADC Tribunal decision, section 232

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I  INTRODUCTION

Almost a decade ago the Constitutional Court boldly proclaimed that there is ‘no escape from the manifest constitutional injunction to integrate, in a way the Constitution permits, international law obligations into our domestic law.’¹ In a recent article we began to consider how, over the intervening years, the Constitutional Court and other courts have given effect to that manifest constitutional injunction.² Our analysis demonstrated how, in successive cases, international law has been drawn deeply into the fabric of South African law and the justiciable obligations of public officials, through what we referred to as the Constitution’s international law trifecta. It is on this basis that we made the claim that we are all international lawyers now. But, lest those words appear no more than hollow rhetoric, the question that we ask and address in this article is, now what (or where to from here)? How does one take seriously the Constitution’s inescapable integrative injunction? What principles flow from the last ten years of progressive and integrative international law jurisprudence? What issues still require resolving in imagining and realising this brave new world of constitutionally integrated international law?

To answer these questions, we start by examining where the cases leave us. We summarise and distil the main principles from the courts’ integrative endeavours. We then consider in more detail certain of the issues that have arisen but remain to be resolved and reconciled. Finally, we suggest that since, by constitutional decree, we are all international lawyers now, we need to avoid certain dangers when interpreting and applying international law, and we provide a discussion of what this requires.

II  THE COURTS’ INTERPRETATION OF THE CONSTITUTION’S INJUNCTION TO INTEGRATE INTERNATIONAL LAW

In the SADC Tribunal matter, the Constitutional Court emphasised that international law ‘enjoy[s] well-deserved prominence in the architecture of our constitutional order.’³ But, in what way is international law given this prominence? The cases demonstrate that there are three central features of the Constitution that give international law its eminence — the Constitution’s international law trifecta.⁴ First, the Constitution requires all legislation to be interpreted as far as possible to comply with and give effect to international law. Second, by virtue of s 232 of the Constitution, customary international law forms part of South African law (unless it is in conflict with the Constitution or legislation). Third, flowing from the Constitution’s enshrining of the rule of law, the courts have determined that it is a justiciable violation of the principle of legality for public officials to act (or take decisions) in breach of

¹ Glenister v President of the Republic of South Africa & Others [2011] ZACC 6, 2011 (3) SA 347 (CC) (Glenister) at para 202.
² A Coutsoudis & M du Plessis ’We are all International Lawyers Now: the Constitution’s International-Law Trifecta Comes of Age’ (2019) 136 South African Law Journal 433. In our discussion below we deal briefly with certain of the points made in that article.
³ Law Society of South Africa & Others v President of the Republic of South Africa & Others [2018] ZACC 51, 2019 (3) SA 30 (CC) (SADC Tribunal) at para 4. The case, as we discuss below, involved the suspension of the Tribunal of the Southern African Development Community (SADC).
⁴ Constitution of the Republic of South Africa, 1996 (the Constitution). In Coutsoudis & du Plessis (note 2 above) we discuss the three key features of the Constitution’s integrative approach to international law.
South Africa’s international law obligations, whether inside or outside South Africa. We briefly discuss these aspects below.

A The Constitution’s international-law-favouring interpretative injunction

Section 233 of the Constitution contains an obligatory international-law-favouring interpretative injunction. It requires courts to prefer any reasonable interpretation of legislation that is consistent with international law over any interpretation which is inconsistent with international law. Thus, the Constitutional Court held in the SADC Tribunal matter that ‘[o]ur Constitution also insists that [courts] not only give a reasonable interpretation to legislation but also that the interpretation accords with international law’. It is not sufficient to interpret any domestic legislation in a manner that is reasonable and textually appropriate; courts must also interpret the legislation to accord with international law.

In S v Okah, the Constitutional Court had occasion to demonstrate how s 233’s interpretative injunction could make the difference in a particular legislative setting. The case involved a criminal prosecution of Mr Okah, a Nigerian national, for terrorist activities. The prosecution occurred under the Protection of Constitutional Democracy against Terrorist and Related Activities Act 33 of 2004 (the Terrorist Act). Mr Okah was charged with 13 counts of terrorism under the Act, in respect of two bombings in Nigeria, which had killed at least nine people. The high court convicted him on all counts. On appeal to the Supreme Court of Appeal (SCA), the SCA interpreted the relevant sections of the Terrorist Act to exclude extraterritorial liability for all but a limited subset of offences (in relation to the financing of terrorist activities). Since Mr Okah was in Nigeria at the time of one of the bombings, the SCA therefore upheld Mr Okah’s appeal and acquitted him on four of the counts of terrorism in respect of that bombing, and partially reduced his sentence. In the appeal to the Constitutional Court, the Court disagreed with the SCA’s interpretation that, correctly interpreted, the Terrorist Act conferred extra-territorial jurisdiction on South African courts to try terrorist offences that occurred outside South Africa. The crucial aspect, for our purposes, is the role that s 233 of the Constitution played in the Court’s decision in Okah. The Court emphasised that ‘[e]ven if one were to assume that [the SCA’s] interpretation [of the Terrorist Act] were reasonable, which a textual analysis shows it is not, s 233 of the Constitution requires this Court to interpret the Act in line with international law’. The Court therefore had regard to South Africa’s international law obligations, in order to interpret the Act properly. The Court found that South Africa’s international law obligation required it to prosecute or extradite those accused of committing terrorist acts. The Court, therefore, on this basis (in addition to its textual interpretation), overturned the SCA’s restrictive interpretation of the Act. The Court held that ‘there is a clear obligation that South Africa prosecute or extradite persons like Mr Okah. The interpretation in this judgment gives effect to that obligation, whereas the Supreme Court of Appeal’s interpretation does not.’ This ultimately led to the Court upholding the state’s appeal against the SCA’s decision. The SCA’s partial acquittals and reduction of sentence were replaced by an order dismissing Mr Okah’s appeal against the high court’s decision.

5 SADC Tribunal (note 3 above) at para 5 (emphasis added).
7 Okah v S & Others [2016] ZASCA 155; [2016] 4 All SA 775 (SCA); 2017 (1) SACR 1 (SCA).
8 Okah ibid at para 38.
9 Okah ibid at para 38.
Thus, in Okah the Court underlined, as it had re-emphasised in SADC Tribunal, that, when interpreting legislation, a mere reasonable interpretation is not sufficient. Courts must consider relevant international law binding on South Africa, and they must interpret domestic legislation to accord with that international law, as far as is reasonably possible. This requires an international-law-first approach. Giving proper effect to s 233 of the Constitution requires that in interpreting domestic legislation a court must first determine whether there is international law binding on South Africa that deals with the relevant subject matter governed by the legislation. If there is such relevant and binding international law, a court must then seek to interpret the legislation to comply with that international law, in so far as the language of the legislation is reasonably capable of that international-law-compliant interpretation.

Linked to this principle is the injunction in s 39(1)(b) of the Constitution. This obligates courts, when interpreting the Bill of Rights, to have regard to international law. And as the Constitutional Court held in Glenister, ‘our Constitution takes into its very heart obligations to which the Republic, through the solemn resolution of Parliament, has acceded, and which are binding on the Republic in international law, and makes them the measure of the State’s conduct in fulfilling its obligations in relation to the Bill of Rights.’ As we discuss in part IIIA3, s 39(1)(b) and s 233 of the Constitution operate to ensure that the Constitution and international law are not in conflict, but are interpreted and applied harmoniously in South Africa.

B Customary international law is South African law

Section 232 is unequivocal. It provides that ‘customary international law is law in the Republic unless it is inconsistent with the Constitution or an Act of Parliament.’ This means that customary international law is automatically and directly incorporated into South African domestic law — ‘it is law in the Republic’.

The totality of the Constitution’s integrative approach is well demonstrated by the fact that it even extends to making international crimes (under customary international law) domestic crimes in South Africa, absent legislation. This was the effect of s 232, as found by the Constitutional Court in the Torture Docket case. The case involved a challenge to the constitutionality of the SA Police Service’s failure to investigate allegations of torture committed in Zimbabwe by Zimbabwean officials. In its decision, the Court held that since torture is a crime in terms of customary international law (and a violation of a peremptory norm of international law), it was also automatically a crime in South Africa, given s 232. In terms of the Implementation of the Rome Statute of the International Criminal Court Act 27 of 2002 (the ICC Act) and the Prevention and Combating of Torture of Persons Act 13 of 2013 (the Torture Act), the international crime of torture, both as a self-standing international crime, and as a crime against humanity — when the torture is part of a widespread and systematic attack — is a crime in South Africa. However, even without this domestic legislation, torture is a crime in South Africa as a consequent of s 232’s domestication of customary international law. The Court made this plain in its judgment. It emphasised that, ‘[t]orture, whether on

10 SADC Tribunal (note 3 above) at para 5.
11 Glenister (note 1 above) at para 178.
13 Torture Docket ibid at para 39.
the scale of crimes against humanity or not, is a crime in South Africa in terms of s 232 of the Constitution because the customary international law prohibition against torture has the status of a peremptory norm.\textsuperscript{14} It went on to explain that, ‘[i]n effect, torture is criminalised in South Africa under s 232 of the Constitution and the Torture Act whilst torture on the scale of crimes against humanity is criminalised under s 232 of the Constitution, the Torture Act and the ICC Act.’\textsuperscript{15} Thus, the Court took care to underscore that its decision was based not only on the effect that the relevant national legislation (the ICC Act and the Torture Act) has on domesticating the crime of torture, but also on the constitutional injunction, in s 232, that customary international law is law in South Africa. According to the Court, s 232 provides a self-standing basis for the domestication of the international crime of torture.\textsuperscript{16}

Naturally, the automatic incorporation of customary international law into South African domestic law presents challenges. Establishing what the customary international law in a particular respect is may not always be straightforward. Customary international law is not static, and, unlike treaty law, it is not neatly set out in instruments. Its extent and content are often contested. The rules of recognition for customary international law (whether there is widespread state practice coupled with \textit{opinio juris} — the acceptance that a practice is undertaken by states due to a legal obligation)\textsuperscript{17} are open textured. This can lead to reasonable disagreements as to whether a particular rule is part of customary international law or not. But courts are obliged to decide cases that come before them in accordance with our domestic law, which, by virtue of s 232, includes customary international law. Thus, however difficult the task of determining the content of customary international law in any particular situation may be, our courts cannot shy away from it. Customary international law is part of South African law. Like any other part of our law, courts can and must determine what that law is, and apply it. Consequently, courts must be as adroit in determining, interpreting, and applying customary international law as any other area of domestic law.

Recent cases demonstrate that our courts can and will be called upon to settle difficult disputes about the content of customary international law. In the \textit{Grace Mugabe} matter,\textsuperscript{18} the key issue in dispute was whether the spouse of a foreign head of state also enjoyed personal immunity from domestic prosecution (in the same way as the head of state did). The Minister of International Relations granted immunity to Grace Mugabe, the wife of the then President of Zimbabwe, Robert Mugabe, under South Africa’s domestic legislation. The Minister did this to protect Ms Mugabe from prosecution for the alleged assault of a young South African woman. The Minister’s basis for granting the immunity was the Minister’s alleged belief that, as the wife of the head of state of a foreign state, Ms Mugabe enjoyed immunity under customary international law, which the Minister argued she was merely recognising. The case

\textsuperscript{14} \textit{Torture Docket} ibid at para 37.
\textsuperscript{15} \textit{Torture Docket} ibid at para 39; see also para 40.
\textsuperscript{16} \textit{Torture Docket} ibid at paras 37, 39, 40, 77.

\textsuperscript{17} For example, see \textit{Democratic Alliance v Minister of International Relations and Co-operation & Others; Engels & Another v Minister of International Relations and Co-operation & Another} [2018] ZAGPPHC 534, 2018 (6) SA 109 (GP) (\textit{Grace Mugabe}) at para 16. In broad terms the International Court of Justice (ICJ), in \textit{North Sea Continental Shelf} (1969) ICJ Rep 3 at para 77, explained the test for whether customary international law applies is as follows: ‘Not only must the acts concerned be a settled practice, but they must also be such, or be carried out in such a way, as to be evidence of a belief that this practice is rendered obligatory by the existence of a rule requiring it. ... The States concerned must feel that they are conforming to what amounts to a legal obligation’.

\textsuperscript{18} \textit{Grace Mugabe} ibid.
reached the high court as a review of the rationality and legality of the Minister’s granting of immunity. Central to the applicants’ review of the Minister’s decision was the submission that the Minister had erred in granting Ms Mugabe immunity, since spouses of heads of state do not enjoy immunity under customary international law. The Minister, persisted in her arguments that not only was she entitled to grant Ms Mugabe immunity but she was obligated to recognise that immunity, given that it was recognised by customary international law. To determine the case the court was therefore compelled to ascertain what the position was in international law. This required the court to undertake a detailed analysis of the customary international law position, to assess whether there was the necessary widespread state practice accompanied by the necessary *opinio juris* supporting the customary recognition of a rule granting spouses immunity. It resulted in the court finding that Ms Mugabe did not enjoy immunity under customary international law, and the court therefore set aside the Minister’s decision to recognise or confer immunity on Ms Mugabe.

Section 232’s incorporative injunction has a limitation. Customary international law will not be incorporated into our law if it conflicts with national legislation or the Constitution. In part IIIA below we consider the fact that s 232 does not allow incorporation when there is conflict with the Constitution.

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**C It is unlawful to not act in accordance with South Africa’s international law obligations**

All exercises of public power must be lawful (*the lawfulness requirement*) and procedurally and substantively rational (*the rationality requirement*). These requirements are the two primary incidences of the principle of legality that flow from the rule of law, enshrined in s 1(c) of the Constitution. International law infuses both the lawfulness requirement and the rationality requirement, as has been made clear by the Constitutional Court in the *SADC Tribunal* decision, which we discuss below. However, before turning to the Court’s decision in that matter, and in order to contextualise the constitutional requirement to comply with

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19 *Grace Mugabe* ibid at paras 16–35.
20 *Grace Mugabe* ibid at para 43.
23 Section 1 provides that: ‘The Republic of South Africa is one, sovereign, democratic state founded on the following values…(c) Supremacy of the constitution and the rule of law.’
international law, it is necessary to begin with a section of the Constitution that has generally escaped judicial attention: s 199(5).

Section 199(5) of the Constitution provides that ‘[t]he security services must act … in accordance with the Constitution and the law, including customary international law and international agreements binding on the Republic.’ Security services are defined as consisting of ‘a single defence force, a single police service and any intelligence services established in terms of the Constitution.’ While, there is no reported case in which a court has considered and pronounced upon s 199(5), its implication and effect are plain. At least in relation to the police, the defence force, and the intelligence services, the Constitution accepts that international law forms part of the ‘law’ that must be complied with. Not to so comply would undoubtedly be a violation of s 199(5), and of course also a violation of the principle of legality flowing from the rule of law, and therefore in terms of s 172(1), the courts would need to declare such conduct to be invalid. However, s 199(5) has a broader implication. It strongly suggests that the Constitution accepts that the obligation to comply with the rule of law (and to adhere to ‘the law’), would naturally, in relevant circumstances, include an obligation to comply with international law. What would those ‘relevant circumstances’ be? This then brings us neatly to a consideration of the decision in SADC Tribunal, where the Constitutional Court found that the President’s actions did indeed cause South Africa to violate its international law obligations. Although the Court makes no reference to s 199(5), in effect, it made clear that the requirement to ensure compliance with international law applies to all exercises of public power.

To properly appreciate the import of the SADC Tribunal decision, which will inform our discussion in this section and the later sections, we highlight the central facts facing the Court. The Court was called upon to confirm the high court’s declaration of invalidity in relation to two decisions: President Zuma’s participation in 2011 in the SADC Summit’s suspension of the SADC Tribunal (the Tribunal); and President Zuma’s signature of the 2014 SADC Protocol on the SADC Tribunal Protocol (the 2014 Protocol). Those decisions arose in the following context. SADC was established on 17 August 1992 in terms of the SADC Treaty. It is an international organisation, which at the relevant time had 15 member states, including South Africa. SADC comprises a number of institutions, including the Summit. The Summit

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24 Where necessary to elucidate certain of the facts set out below, in addition to what is dealt with in the judgment, we have also had regard to the full Constitutional Court record (which is on file with us) in SADC Tribunal (note 3 above); and, to the extent necessary, we draw from the undisputed facts therein in the brief factual summary below.

25 The Summit of the Heads of State or Government (the Summit) of the Southern African Development Community (SADC) established by art 9 of the Treaty of the Southern African Development Community, 1992 (the SADC Treaty).


27 In 2018, the Union of the Comoros became SADC’s sixteenth member state (see the SADC website, which records that ‘[t]he Union of the Comoros was admitted to SADC at the 37th SADC Summit of Heads of State and Government in August 2017, then became a full member at the 38th Summit of Heads of State and Government on August 2018 in Windhoek Namibia.’ Available at https://www.sadc.int/member-states/comoros/. At the time the relevant facts in the SADC Tribunal matter arose, there were only 15 members. As we discuss below, the number of members is relevant for determining the number of votes and ratification required. We will continue to refer to 15 members when discussing the number of votes or ratifications required for decisions because they were relevant at that time.

28 Articles 9(1)(a) and 10(1) of the SADC Treaty.
is ‘the supreme policy-making institution of SADC,’29 and its members are the heads of state or government of the SADC’s member states.30 It is ‘responsible for the overall policy direction and control of the functions of SADC’.31 Unless the SADC Treaty otherwise provides, ‘the decisions of the Summit shall be taken by consensus and shall be binding.’32 The Summit is invested with significant powers by the Treaty, which includes the power to amend the Treaty,33 the power to dissolve any SADC institution (which includes the Tribunal)34 and SADC itself.35 The President, as the head of state of South Africa, is a member of the Summit.

The Tribunal is provided for in the Treaty, but its jurisdiction and other functions are not. Article 16(2) of the Treaty provides in relevant part that ‘the composition, powers, functions, procedures and other related matters governing the Tribunal shall be prescribed in a Protocol’ which is to be adopted by the Summit, and which Protocol will then form an integral part of Treaty. The current Protocol governing the Tribunal is the 2000 Protocol. As recognised and explained by the Constitutional Court in an earlier decision in Fick,36 the Tribunal was only brought into existence by the Summit exercising its power to amend the SADC Treaty. The Summit took a decision in 2001 to bring the 2000 Protocol (which provides for the functioning and jurisdiction of the Tribunal) into operation by exercising its power to amend the SADC Treaty to incorporate the unratified 2000 Protocol into the Treaty. This is because there had been insufficient ratification to bring the 2000 Protocol into force, so the ratification requirement in the 2000 Protocol was effectively dispensed with by amending art 16 of the Treaty to make the Tribunal Protocol adopted by the Summit an integral part of the Treaty.37 The Tribunal only became operational in November 2005 after its first members were appointed. However, in May 2011, the Summit decided at its meeting in Namibia,38 by consensus, to suspend the Tribunal (after putting in place a temporary moratorium, in

29 Article 10(1) of the SADC Treaty.
30 Ibid.
31 Ibid art 10(2).
32 Ibid art 10(9).
33 Ibid art 36(1).
34 Ibid art 9(g).
37 Originally art 16(2) provided as follows: ‘The composition, powers, functions, procedures and other related matters governing the Tribunal shall be prescribed in a Protocol adopted by the Summit.’ Article 16(2) (as amended) now provides that: ‘The composition, powers, functions, procedures and other related matters governing the Tribunal shall be prescribed in a Protocol, which shall, notwithstanding the provisions of Article 22 of this Treaty, form an integral part of this Treaty, adopted by the Summit.’ See the Agreement Amending the Treaty of the SADC of 14 August 2001 and Fick (note 36 above) paras 9, 10; and Government of the Republic of Zimbabwe v Fick & Others [2012] ZASCA 122 (Fick SCA) at paras 35, 36. In 2002, the Summit also formally amended the 2000 Protocol, and inter alia, deleted the article in the 2000 Protocol which had provided expressly that it would only enter into force once instruments of ratification from two-thirds of the Member States were deposited with SADC. See Agreement amending the Protocol on the Tribunal 2002 (a copy of which is on file with the authors). This Protocol Amendment Agreement further noted, in its preamble, that the states parties recognised that ‘the Protocol on the Tribunal was adopted by Summit at Windhoek on 7th August 2000 and that the Protocol entered into force upon the adoption of the Agreement Amending the Treaty of the Southern African Development Community at Blantyre on 14th August 2001’.
38 The Summit meeting took place on 20 May 2011, in Windhoek, Namibia. A copy of the Summit Communiqué is on file with the authors.
August 2010, on it hearing new cases). In particular, the Summit put in place a moratorium on receiving any new cases or hearings of any cases by the Tribunal, and decided not to reappoint members to the Tribunal whose term of office would be expiring.\(^{39}\)

President Zuma did not attend the Summit meeting in May 2011, but the South African High Commissioner to Namibia represented him.\(^{40}\) At the 2012 Summit meeting, the Summit decided that a new Protocol should be negotiated for the Tribunal, which would limit the Tribunal’s jurisdiction to hearing inter-state complaints (complaints brought by states), and not complaints from individuals.\(^{41}\) Thus began a process of negotiation within SADC and its various institutions to prepare and adopt a new Protocol for the Tribunal, which provided for a more limited mandate for the Tribunal. In August 2014, this process culminated, with the August 2014 Summit meeting held in Zimbabwe,\(^{42}\) where the Summit adopted the 2014 Protocol, which limited the jurisdiction of the Tribunal to deal with inter-state complaints. The 2014 Protocol expressly provided that: (a) it required ratification to become binding, not a mere signature;\(^{43}\) (b) it would only enter into force, if and when two-thirds of the member states (10 of the 15 member states) had ratified the Protocol, ‘in accordance with their constitutional procedures’, by depositing instruments of ratification with SADC;\(^{44}\) and (c) it would only replace the extant 2000 Protocol once it came into force.\(^{45}\)

At the Summit meeting where the 2014 Protocol had been adopted by the Summit, and opened for signature, President Zuma signed the 2014 Protocol (which limited the jurisdiction of the Tribunal, more especially by removing the right of individuals to lodge complaints with the Tribunal). The high court declared the President’s participation in the suspension of the Tribunal and his signature of the 2014 Protocol unconstitutional. The Constitutional Court confirmed the high court’s declarations and it ordered the President (by that time President Ramaphosa) to withdraw the President’s signature of the 2014 Protocol. The President duly complied with the order and withdrew the signature of the Protocol.\(^{46}\)

The first important point to draw from the SADC Tribunal decision is that even though the President’s exercises of public power occurred outside of South Africa (the participation

\(^{39}\) In the recordal in para 5 of Law Society of South Africa & Others v President of the Republic of South Africa & Others [2018] ZAGPPHC 4, 2018 (6) BCLR 695 (GP) (SADC Tribunal HC), where the high court quotes with approval from paragraph 25 of the Law Society’s heads of argument.

\(^{40}\) SADC Tribunal HC ibid at para 5 (where the court quotes from para 26 of the Law Society’s heads of argument).

\(^{41}\) As reflected in the Summit Communiqué, President Zuma’s representative was the High Commissioner.

\(^{42}\) In footnote 2 of para 9 in Fick (note 36 above) the Court took account of this development.

\(^{43}\) President Zuma signed the 2014 Protocol at the conclusion of the 2014 Summit meeting when it was adopted at Victoria Falls, Republic of Zimbabwe, on 18 August 2014.

\(^{44}\) Article 52 of the 2014 Protocol provides that, '[t]his Protocol shall be ratified by Member States who have signed the Protocol in accordance with their constitutional procedures.’ (Emphasis added.)

\(^{45}\) 2014 Protocol arts 53, 55.


\(^{46}\) In the President’s formal letter of withdrawal of the signature addressed to the Executive Secretary of SADC, which was formally conveyed to the SADC secretariat in terms of a note verbale from the South African High Commissioner to Botswana, the President stated, inter alia, that: ‘I wish to inform you that the Government of the Republic of South Africa does not have the intention of becoming a Party to the Protocol, and hereby withdraws the aforementioned signature from the Protocol. Accordingly, South Africa has no legal obligations arising from its signature on 18 August 2014. In this regard, you are requested, in your capacity as the Depositary of the Protocol, to reflect in your records that the signature on the Protocol on behalf of the Republic of South Africa has been withdrawn, and that South Africa is no longer a signatory to the Protocol.’ (A copy of the letter and note verbale are on file with the authors.)
in the Summit suspension decision, in Namibia, and the signature of the 2014 Protocol, in Zimbabwe, the Court saw no difficulty in holding that the exercises of public power were subject to constitutional constraint and control and were reviewable.

Second, the decision made clear that it was unlawful for the President to exercise public power in such a way as to cause South Africa to violate its international law obligations (or put differently, to act, when representing South Africa, inconsistently with South Africa’s international law obligations). Thus, the Court accepted that government actions which violate international law or cause South Africa to violate international law (in this case treaty obligations under the SADC Treaty) are unconstitutional and invalid. Of course, the President’s actions affected the ability of citizens to bring claims before the SADC Tribunal (because the Tribunal was suspended, and since the President signed a Protocol, which if it were ratified and came into force, would then remove the Tribunal’s individual jurisdiction permanently). Therefore, the President’s conduct implicated the right of access to courts, which is protected by s 34 in South Africa and at the regional level by the SADC Treaty incorporating the 2000 Protocol.

In part IIIC we consider whether, for an exercise of public power that violates or causes South Africa to violate international law to be held to be unconstitutional, it is necessary for there to be some implication for the rights in the Bill of Rights.

The third key aspect of the SADC Tribunal decision is that it confirms that even when a South African official represents the country in an international organisation (such as the SADC Summit) her action or inaction, including in relation to voting (in this case the President’s representative participated without objection in the Summit’s decision to suspend the Tribunal), may amount to an unlawful and unconstitutional exercise of public power if it constitutes a violation (or undermining) of South Africa’s international law obligations or the Constitution (in particular the Bill of Rights). This has implications for the way in which South African representatives conduct themselves in international fora when South Africa is a party to that forum (which currently includes the UN Security Council).

The fourth important point to draw from the decision relates to the rationality requirement of the principle of legality. This requires actions to be procedurally rational. The Court held that this requirement applied equally when South Africa participated in the decision-making of an international organisation. If South Africa’s representatives participate in the decision-making process of an international organisation, and that organisation’s process does not comply with any relevant procedural prescripts in that organisation’s rules or treaty, then a South African representative’s participation will be irrational and may be declared unconstitutional on that basis since it violates the principle of legality.

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47 SADC Tribunal (note 3 above) at para 71, and see discussion below in part IIIB.
48 SADC Tribunal (note 3 above) at paras 75, 77, 78.
49 For example, the Court in SADC Tribunal (note 3 above) at para 3 held succinctly that ‘[a]ll presidential or executive powers must always be exercised in a way that is consistent with the supreme law of the Republic and its scheme, as well as the spirit, purport and objects of the Bill of Rights, our domestic legislative and international law obligations.’ And see para 77, where the Court held that, ‘[t]he President may therefore not approve anything that undermines our Bill of Rights and international law obligations.’ See also the further discussion in part III(B).
50 South Africa’s two-year term ends in 2020; see the UN Security Council website, available at https://www.un.org/securitycouncil/content/current-members.
51 For example, see Scalabrini (note 22 above) at para 68; Democratic Alliance (CC) (note 22 above) at para 34; and Democratic Alliance (SCA) (note 22 above) at para 66.
52 SADC Tribunal (note 3 above) at paras 61–71.
The Court held that, since the 2000 Protocol, which governed the Tribunal’s jurisdiction, was an integral part of the SADC Treaty (as provided for in art 16 of the Treaty), and given the specific provision in the SADC Treaty for the amendment of the Treaty, the 2000 Protocol could not simply be replaced by the adoption of a new Protocol. Rather, the different requirements for amendment of the Treaty had to be utilised. The failure to use the Treaty-amendment procedure and instead to use the Protocol-procedure — given the linked failure to realise that the more rigorous procedure was necessary, given the enormity of the decision to amend the Tribunal’s core jurisdiction — meant that the decision was procedurally irrational and unlawful. We return to the Court’s analysis of the irregularity of the procedure adopted by the Summit in more detail in part IVA below. It provides a useful example of the importance of domestic courts’ proper appreciation of the relevant context when they venture into the terrain of international law.

In summary, the SADC Tribunal decision establishes the principle that government officials are required by the Constitution to act in accordance with international law binding on South Africa, including international law which prescribes the procedures to be followed by an international organisation to which South Africa is a party. If they fail to do so, their actions, including on the international plane, will be declared invalid by our domestic courts.

III NOW WHAT? NAVIGATING THE ROAD AHEAD

The Constitutional Court and other courts have done much over the last few years ‘to integrate, in a way the Constitution permits, international law obligations into our domestic law.’ The broad outline of that integration is now well-established by the recent jurisprudence which we have summarised in the previous section. Nevertheless, much remains that is not fully resolved. And that which is clear, presents fresh challenges for courts and practitioners, and new opportunities too.

A Conflicts between international law and the Constitution

The Constitution gives international law pride of place in our constitutional democracy. As we have seen the Constitution does this primarily through its international-law trifecta, as interpreted and elucidated by our courts. However, the Constitution still asserts its own primacy in the domestic sphere over international law. It is therefore necessary to understand when and how the Constitution and international law obligations may conflict, and how courts should deal with these conflicts.

53 SADC Tribunal (note 3 above) at para 49. Article 36 of the SADC Treaty provides that: ‘1. An amendment of this Treaty shall be adopted by a decision of three-quarters of all the Members of the Summit. 2. A proposal for amendment of this Treaty may be made to the Executive Secretary by any Member State for preliminary consideration by the Council, provided, however, that the proposed amendment shall not be submitted to the Council for preliminary consideration until all Member States have been duly notified of it, and a period of three months has elapsed after such notification.’

54 SADC Tribunal (note 3 above) at paras 71.

55 For example, see SADC Tribunal (note 3 above) at para 56.
1 Conflicts with customary international law

The Constitution deals expressly with the possibility of conflict between the Constitution and international law in s 232, when it provides for the automatic incorporation of customary international law into our law. The section provides that customary international law is law in South Africa. However, the automatic incorporation comes with an important caveat: ‘unless it is inconsistent with the Constitution’. If a customary international law rule that is binding on South Africa on the international plane, and would otherwise automatically form part of our domestic law, were to be in conflict with the Constitution, then that rule would not be incorporated into our domestic law. As the Court held in the *SADC Tribunal* matter, ‘implicit [in the position created by s 232 is that consistency with our Constitution is a critical requirement for the acceptability and applicability of international law to our country.’

To date, there has been no reported decision in which a court has found that any part of customary international law could not be incorporated because of such constitutional conflict. However, the application of s 232’s constitutional limitation on incorporation did arise in the *SADC Tribunal* matter. One of the issues considered was whether the challenge to the President’s signature of the 2014 Protocol had been premature, given that the 2014 Protocol required ratification to become binding, not mere signature, and the 2014 Protocol had not yet been referred to Parliament for its approval or rejection, and therefore had not been made binding on South Africa. In dealing with this issue, the Court had regard to art 18(a) of the Vienna Convention. This article creates an obligation on the state after signature of a treaty, but prior to its ratification, to ‘refrain from acts which would defeat the object and purpose of’ the treaty until such time as the state makes clear that it does not intend to become party to the treaty. Importantly, even though the Court found that the obligation which art 18(a) created on signature was part of customary international law, the Court did not then simply accept that this obligation was made domestically applicable. Rather it drew attention to the fact that s 232 does not allow for the incorporation of customary international law into South African law where that customary international law is in conflict with the Constitution. Therefore, the Court considered whether the obligation in art 18 might be argued to conflict with the provisions of s 231(2) (which made international agreements binding only after they had been approved by Parliament). The Court, given its interpretation of the limited nature of the obligation in art 18, held that there was no conflict, between art 18 and s 231(2). Thus, the Court accepted that art 18, as a codification of customary international law, formed part of our law.

The constitutional limitation on the automatic domestication of customary international law also rose in the *Grace Mugabe* case. The amici in the case submitted that if customary international law did recognise the immunity from criminal prosecution for the spouses of heads of state (as the Minister argued), s 232 would, nevertheless, prohibit the incorporation of such immunity into our law, since allowing Ms Mugabe to enjoy immunity from prosecution for her alleged assault on a young South African woman in South Africa would violate rights

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56 Section 232 similarly provides that customary international law is not incorporated if it is inconsistent with South Africa’s national legislation.
57 *SADC Tribunal* (note 3 above) at para 5.
58 *SADC Tribunal* (note 3 above) at para 21.
in the Constitution. However, because the court found that Ms Mugabe did not in fact enjoy immunity under customary international law, it became unnecessary to determine whether, had Ms Mugabe enjoyed such immunity, this would have been in conflict with the Constitution.

The possibility for conflicts between the Constitution and a binding rule of customary international law is also limited by the government’s obligation to conduct South Africa’s international relations in a manner that is informed by and gives effect to the Constitution and the Bill of Rights. This obligation would require the government to take steps to persistently object to customary international law that is in conflict with the Constitution, and customary international law that is so objected to that it does not bind South Africa. Obviously, *jus cogens* (peremptory) norms of international law may not be persistently objected to. However, we see little prospect that our Constitution will find itself in conflict with any peremptory norms of international law.

2 **Conflicts with international agreements**

The possibility of conflict between the Constitution and international law does not only arise in respect of customary international law. It may, in principle, also arise in respect of conflicting constitutional and international treaty obligations. The issue of conflict between the Constitution and international treaty obligations arose to an extent in the recent *Prince* decision, in the context of the constitutionality of certain domestic legislation. The case involved a challenge to the constitutionality of legislation that criminalised the possession and use of cannabis. The high court declared certain legislation that criminalised possession of cannabis by individuals for private use to be unconstitutional. As required by s 172(2), the high court’s declarations of invalidity were referred to the Constitutional Court for confirmation. In opposing the Court’s confirmation of the declaration of invalidity, the State

60 *Grace Mugabe* (note 16 above) at para 36.

61 *SADC Tribunal* (note 3 above) and the discussion above.


‘Persistent objector 1. Where a State has objected to a rule of customary international law while that rule was in the process of formation, the rule is not opposable to the State concerned for so long as it maintains its objection. 2. The objection must be clearly expressed, made known to other States, and maintained persistently. 3. The present conclusion is without prejudice to any question concerning peremptory norms of general international law (*jus cogens*).’ See also Draft Conclusion 14(3) of the ILC’s Draft Conclusions on Peremptory Norms of General International Law (*Jus Cogens*) which was considered and adopted, on first reading, by the ILC in 2019 (A/CN.4/L.936), available at http://legal.un.org/docs/?symbol=A/CN.4/L.936). Draft Conclusion 14(3) provides that ‘[t]he persistent objector rule does not apply to peremptory norms of general international law (*jus cogens*).’

63 Draft Conclusion 14(3) of the ILC’s Draft Conclusions on Peremptory Norms of General International Law ibid.

64 *Minister of Justice and Constitutional Development & Others v Prince* (Clarke & Others intervening) [2018] ZACC 30, 2018 (6) SA 393 (CC) (*Prince*). The high court decision, by Davis J, was reported as *Prince v Minister of Justice and Constitutional Development & Others* [2017] ZAWCHC 30, 2017 (4) SA 299 (WCC).

65 In particular, ss 4(b) and 5(b) of the Drugs and Drug Trafficking Act 140 of 1992 (Drugs Act) and ss 22A(9)(a) (l) and 22A(10) of the Medicines and Related Substances Control Act 101 of 1965 (Medicines Act). The high court declared that these were unconstitutional ‘only to the extent that they prohibit the use of cannabis by an adult in private dwellings where the possession, purchase or cultivation of cannabis is for personal consumption by an adult’ (as noted by the Constitutional Court in *Prince* (note 64 above) at para 18).
raised the possible conflict with various international treaties that South Africa is a party to. What is of interest is the manner in which the Court dismissed the State’s attempt to rely on conflict with certain international treaties. The Court held that:

Counsel for the State referred to various international agreements to which South Africa is a signatory and submitted that South Africa is obliged to give effect to these international agreements. The answer to the submission is that South Africa’s international obligations are subject to South Africa’s constitutional obligations. The Constitution is the supreme law of the Republic and, in entering into international agreements, South Africa must ensure that its obligations in terms of those agreements are not in breach of its constitutional obligations. This Court cannot be precluded by an international agreement to which South Africa may be a signatory from declaring a statutory provision to be inconsistent with the Constitution. Of course, it is correct that, in interpreting legislation, an interpretation that allows South Africa to comply with its international obligations would be preferred to one that does not, provided this does not strain the language of the statutory provision.66

Unfortunately, the Court did not engage in a detailed traversal of the relevant international treaty obligations, and whether they are in truth in conflict with the Constitution. This is important, since international treaties are usually nuanced documents. They ordinarily include many exceptions and qualifications. They are sophisticated agreements that bear witness to years of negotiation, compromise, and pragmatism. They require careful interpretation. It would have been useful had the Court seen fit, rather than assuming (even if merely for the sake of argument), as appears to be the case, that the State was correct that the international obligations required the State to enact the criminal legislation in issue, to have properly investigated whether this was in fact correct. In the Grace Mugabe case, the State’s strenuous written and oral argument that Ms Mugabe enjoyed immunity under international law was, once carefully analysed by the court, found not to be the situation. The court’s finding, therefore, avoided any possible conflict with the Constitution. Nevertheless, the manner that the Court in Prince avoided such a detailed traversal of the international agreements is significant for our purposes. It demonstrates, in broad strokes, how the Court understands the way in which the Constitution deals with conflicts between it and our international law obligations. A number of significant principles can be drawn from what the Court held in Prince.

First, the Court highlighted that since the entering into of international agreements is a voluntary exercise (outside of jus cogens norms which may not be derogated from even by agreement,67 all international law, is, at its core, consensual),68 the government may not seek to bind South Africa to international agreements that are in violation of the Constitution. To do so would be an unconstitutional exercise of public power. Indeed, as demonstrated by the SADC Tribunal matter, if a court finds that the signature of an international agreement

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66 Prince (note 63 above) at para 82.
67 The Vienna Convention arts 53 and 64. Article 53 provides that ‘A treaty is void if, at the time of its conclusion, it conflicts with a peremptory norm of general international law. For the purposes of the present Convention, a peremptory norm of general international law is a norm accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character.’ And art 64 provides that, ‘If a new peremptory norm of general international law emerges, any existing treaty which is in conflict with that norm becomes void and terminates.’
68 International agreements must be agreed to (whether by ratification or accession or otherwise) and customary international law forms through the practice of states and their opinio juris, and may be persistently objected to by individual states.
is unconstitutional, the court can and will order the executive to withdraw South Africa’s signature.\textsuperscript{69} Similarly, the Court emphasised that Parliament cannot approve an international agreement that violates the Bill of Rights or South Africa’s international obligations.\textsuperscript{70} As the Court held, more generally, in the \textit{SADC Tribunal} decision, the executive, when conducting international relations on the international plane, must do so in a manner that respects, protects, promotes and fulfils the rights in the Bill of Rights; and failing to do so will be unconstitutional, and reviewable. The Constitution therefore requires that the executive and Parliament ensure that when they take steps to bind South Africa to international obligations, they must not do so when this would be inconsistent with the Constitution.

So, when acting on the international plane, on behalf of South Africa, members of the executive are not free agents. The Constitution sets the lawful limits and thereafter banks of any South African international policy and practice, which includes diplomatic relations, as well as the entering into of international treaties. This should ensure the possibility of significantly limiting any conflict between international treaties binding on South Africa and the Constitution. The thrust of the Court’s findings in \textit{Prince} is that government, mindful of its constitutional obligations, can be expected to avoid entering into international agreements that conflict with the Constitution. If members of the executive err in this regard, the \textit{SADC Tribunal} decision shows that the courts can and will declare government actions unconstitutional, and will require, if appropriate, steps to be taken on the international plane to ensure that South Africa extricates itself from such obligations.\textsuperscript{71}

The second principle that one can draw from the Court’s statement in \textit{Prince} is that in the unlikely event that there is, in truth, a conflict between properly interpreted constitutional provisions and properly interpreted international law binding on South Africa, then the Court is required to specify that its obligation to test legislation for constitutional compliance, and to declare legislation that is inconsistent to be invalid,\textsuperscript{72} cannot be limited by international agreements to which South Africa is a party. In other words, if provisions of national legislation violate the Constitution, they cannot be saved from invalidity on the basis that the provisions are in accordance with or necessary to give effect to South Africa’s international law obligations. Of course, if the executive believes that any domestic legislation is necessary (as opposed to merely desirable) to give effect to South Africa’s international obligations, it must seek to enact legislation that gives effect to those obligations in a constitutionally compliant manner. And, as the Court explained, the government should not seek to make South Africa a party to international agreements that are in conflict with the Constitution.

Thus, in practice, we see no reason why, by careful and sensible drafting, national legislation cannot be both constitutionally valid, and, where necessary, give effect to international obligations. This is particularly so, as the Court is cautious to stress, since national legislation must in any event be interpreted so as to comply with international law, unless such

\textsuperscript{69} \textit{SADC Tribunal} (note 3 above) at para 94.
\textsuperscript{70} \textit{SADC Tribunal} (note 3 above) at para 79.
\textsuperscript{71} In the \textit{SADC Tribunal} case (note 3 above), the President’s signature of the 2014 Protocol was found to be unconstitutional, and he was ordered to withdraw his signature of the 2014 Protocol. In \textit{Democratic Alliance v Minister of International Relations and Cooperation & Others} [2017] ZAGPPHC 53, 2017 (3) SA 212 (GP) (\textit{ICC Withdrawal}), the government’s giving of notice withdrawing South Africa from the Rome Statute of the International Criminal Court (the Rome Statute of the ICC) was found to be unconstitutional, and the government was ordered to formally revoke the notice of withdrawal (see para 84, order 3).
\textsuperscript{72} An express obligation placed on courts, in terms of s 172(1)(a) of the Constitution.
interpretation would unduly strain the language of the legislation. It therefore appears unlikely that irreconcilable conflict will arise between the Constitution and international law obligations voluntarily assumed by South Africa.

3 The Constitution itself must be interpreted with regard to international law

Not only must South Africa act on the international plane in a manner that will ensure that it is not bound by obligations that are in conflict with the Constitution, it must interpret the Constitution itself with due regard to international law. Section 39(1)(b) of the Constitution decrees that every court must consider international law when interpreting the Bill of Rights. Thus, even the Bill of Rights, the normative core of South Africa’s constitutional democracy, must be interpreted having due regard to international law (although, s 39(1)(b), unlike s 233, does not require a court to adopt the interpretation that accords with international law). Thus, it would be difficult to imagine a correctly interpreted section of the Constitution creating conflicting obligations to South Africa’s international law obligations. Moreover, as indicated above, the executive must not bind South Africa to an international obligation that would violate the Constitution, and should persistently object to the formation of any customary international law in conflict with the Constitution. There is thus, normally, a virtuous cycle, where international law and constitutional law are interpreted so as to ensure unity and harmonisation, not conflict. It is precisely this virtuous cycle that arose in the recent decision in *Centre for Child Law & Others v Minister of Basic Education & Others*. The case, which came before a full bench of the Eastern Cape High Court, dealt with the right of children who lack the necessary identity documents, passports, birth certificates or permits, to receive public schooling. When the court dealt with interpreting the relevant legislation in conformity with international law, it noted:

Section 233 of the Constitution also enjoins courts when interpreting legislation to prefer any reasonable interpretation that is consistent with international law over any alternative interpretation that is not. Reference has already been made herein above to conventions signed and ratified by South Africa to which the courts are bound to give effect to. These conventions have, on previous occasions, been the source from which the Constitutional Court drew whilst interpreting the provisions in the Bill of Rights.

Thus, the court made the point that the applicable international law that it needed to have regard to, and give effect to when interpreting the relevant legislation as required by s 233 of the Constitution, was also considered and used by the Constitutional Court when interpreting the relevant provisions of the Bill of Rights. Thus, in essence, when interpreting legislation so as to ensure compliance with the Bill of Rights (as required by s 39(1)(b)), and when interpreting legislation to ensure compliance with international law (as required by s 233), no conflict need arise between these two interpretative requirements. That is because the relevant international law would already have been used in determining the scope of the rights in the Bill of Rights. Even though the Court has regard for international law when interpreting a right in the Bill

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of Rights, there may be instances in which the Court may find that the right as expressed in our Constitution is materially different, and cannot reasonably be interpreted to fully align with the position in an international law agreement. But, for the reasons indicated above, the executive and legislature are under a constitutional obligation to ensure that South Africa does not become bound to any international agreement that is irreconcilably in conflict with rights in the Bill of Rights. Therefore, even though the international-law-first approach required by s 233 must, by necessity, be limited by the obligation to interpret all legislation to ensure consistency with the Constitution (and thus such reasonable constitutional interpretation would need to be adopted, even if it were inconsistent with international law), the prospect of international-law-first interpretation, and interpreting legislation to ensure constitutional compliance, means that the possibility of conflicting interpretations is limited.

4 The Constitution and international law obligations in harmony

In summary, given our discussion above, one can see that there are three broad reasons why the possibility for direct and irreconcilable conflict between international law binding on South Africa and the Constitution is limited. First, in terms of s 39(1)(b), when interpreting the Bill of Rights, the normative heart of the Constitution, courts are required to consider international law. Thus, the rights in the Bill of Rights are generally interpreted in an international-law compliant manner where possible. This ensures that it would be unlikely that a rule of international law would be directly in conflict with a properly interpreted right in the Bill of Rights. This is well demonstrated by the Centre for Child Law decision, discussed above, where the court makes clear that the relevant international law treaties drawn to its attention had already been relied on by the Constitutional Court in interpreting the content and scope of the relevant rights in the Bill of Right. In the SADC Tribunal matter, the Constitutional Court spoke of the ‘centrality’ of international law in ‘shaping our democracy’ and emphasised the ‘critical role that we need international law to play in the development and enrichment of our constitutional jurisprudence’. And, as the Constitutional Court has held, the ‘Constitution reveals a clear determination to ensure that the Constitution and South African law are interpreted to comply

75 For instance, the Constitutional Court had regard to the International Covenant on Economic, Social and Cultural Rights (ICESCR) when interpreting (a) the right of access to adequate housing (in Government of the Republic of South Africa & Others v Grootboom & Others [2000] ZACC 19, 2001 (1) SA 46(CC) at paras 27–28; and in Jaftha v Schoeman & Others [2004] ZACC 25, 2005 (2) SA 140 (CC) paras 23–24), (b) the right of access to health care services (in TAC), and (c) the right of access to sufficient water (in Mazibuko v City of Johannesburg [2009] ZACC 28, 2010 (4) SA 1 (CC) at 52–53, and fn 31). The Court did so even though at the time South Africa was not a party to the ICESCR, as it had only signed but not ratified it (South Africa finally ratified the ICESCR in 2015). Of relevance, the Court pointed out in Grootboom ibid at para 28 that, ‘[t]he differences between the relevant provisions of the Covenant and our Constitution are significant in determining the extent to which the provisions of the Covenant may be a guide to an interpretation of s 26 [of the Constitution].’

76 SADC Tribunal (note 3 above) at para 4.
with international law’. Second, it would be unconstitutional for South Africa to seek to become a party to and bound by an international agreement which created any obligations in conflict with the Constitution. Third, the government would be constitutionally obligated to persistently object to any customary norm, during the process of formation of that norm, if it conflicts with the Constitution. Such customary international law would not be binding on South Africa, and therefore would not be incorporated in terms of s 233.

The picture by now is clear: the Constitution ensures an integrative and constitutionally consistent approach to international law, which should in principle limit the instance of direct conflict between South Africa’s international obligations and the Constitution.

B Section 231 and how international treaties are entered into and domesticated

In SADC Tribunal, the Court was faced with several issues arising from the interpretation and application of s 231 of the Constitution. Section 231 prescribes how South Africa enters into and becomes bound by international agreements, and how those international agreements are domesticated. While the Court dealt with the section, the Court left much unanswered. Moreover, the Court’s approach to certain of the issues raises questions that will need to be resolved in order to give a proper account of how and to what extent international treaty obligations become applicable and binding in South Africa. We consider and deal with these issues below, in the hope of resolving those issues and providing a consistent and complete account of the Constitution’s integration of international treaty law into our law in light of our courts’ current jurisprudence: to read the Court’s approach in its best light.

By way of introduction, as then Chief Justice Ngcobo opined in the minority decision in Glenister, s 231 is ‘deeply rooted in the separation of powers’. It creates a careful balance of powers and responsibilities between the legislature and the executive. An appreciation of that constitutionally-ordained separation is vital to understanding the central features of s 231 and in dealing with the issues that arise in applying s 231. We discuss those central features below, and the issues that arise from them.

77 Glenister (note 1 above) at para 97 (Ngcobo CJ), quoted with approval in the Torture Docket matter (note 12 above) at para 22. A similar view was expressed in the recent decision of Chang v Minister of Justice and Correctional Services & Others; Forum de Monitoria do Orçamento v Chang & Others [2019] ZAGPJHC 396, [2020] 1 All SA 747 (GJ) (Chang). The case dealt with a review of the Minister of Justice’s decision to extradite Mr Chang (a former Minister of Finance of Mozambique) to Mozambique. The court held that, ‘[t]he Constitution reveals a clear and uncompromising commitment to ensure that the Constitution and South African law are interpreted to comply with international law and in particular international human rights law. Firstly, s 233 requires legislation to be interpreted in compliance with international law; secondly, s 39(1)(b) requires courts, when interpreting the Bill of Rights, to consider international law; finally, s 37(4)(b)(i) requires legislation that derogates from the Bill of Rights [in a state of emergency] to be “consistent with the Republic’s obligations under international law applicable to states of emergency.”’ (para 67, emphasis added)

78 For further discussion, see SADC Tribunal (note 3 above) at paras 75 and 77, and the discussion of this decision in part IIC.

79 Drafting Conclusion 15 in the Draft Conclusions on Identification of Customary International Law (note 62 above).

80 Glenister (note 1 above) at para 89.
1 The executive’s limited power to negotiate and sign international agreements

The first aspect that one notices in considering s 231 is that it expressly makes ‘[t]he negotiating and signature of all international agreements … the responsibility of the national executive’.

In the ICC Withdrawal case, the full bench of the high court held that s 231(1) only gives the national executive limited power to undertake the ‘exploratory work’ of negotiating and signing international agreements, but this does not bind South Africa to such international agreements. Moreover, the high court held, no doubt on the basis that s 231(2) makes clear that South Africa is only bound by a treaty once Parliament has approved it, that an executive’s signature of an international agreement ‘has no direct legal consequences’. However, in the SADC Tribunal matter the Constitutional Court, without referring to the ICC Withdrawal case, found that the signature on an international agreement is of some legal significance. The Court found this to be the case in particular because of art 18 of the Vienna Convention of the Law of Treaties (the Vienna Convention). The Court held that art 18 formed part of customary international law, and therefore was binding on South Africa, even though South Africa was not a party to the Vienna Convention. Article 18 provides, in relevant part, that a ‘State is obliged to refrain from acts which would defeat the object and purpose of a treaty when … it has signed the treaty or has exchanged instruments constituting the treaty subject to ratification, acceptance or approval, until it shall have made its intention clear not to become a party to the treaty.’ The International Law Commission (ILC) has pointed out, that ‘[i]t is unanimously accepted that article 18, paragraph (a), of the Convention does not oblige a signatory state to respect the treaty, but merely to refrain from rendering the treaty inoperative prior to its expression of consent to be bound’. In its judgment, the Court in SADC Tribunal did not undertake a detailed analysis of the nature of the obligation created by art 18. However, the Court appeared to accept that art 18 does not mean that by signing a treaty that must still be ratified that, absent ratification, such signature binds South Africa to comply with the treaty. Rather, art 18 creates a good faith obligation not to act in such a way as to defeat the object and purpose of the treaty which, inter alia, requires a state not to act in ways that would render future compliance with the treaty, if and when it is ratified and has come into force, impossible. In particular, the Court held that ‘[a]rticle 18 alludes to the need for Parliament to still ratify. It does no more than restrain a State that has signed a treaty from acting in a manner inconsistent with the spirit of that treaty or its own commitment as borne out by the

81 Emphasis added.
82 ICC Withdrawal (note 71 above) at para 55. The court made its decision in the context of an international agreement that needed to be approved by Parliament, under s 231(2) to be made binding. An international agreement that does not require parliamentary approval, and can be tabled under s 231(3) before Parliament, may mean that the executive has a different role. We discuss s 231(3) below.
83 ICC Withdrawal ibid at para 47.
85 SADC Tribunal matter (note 3 above) at para 39.
86 Emphasis added.
signature, pending ratification.\textsuperscript{89} It was on the basis of this finding, as to the limited effect of art 18, that the Court was willing to hold that the customary international law principle as embodied in art 18, was not in conflict with s 231(2) of the Constitution, and therefore formed part of our domestic law (in terms of s 232). This was so since the Court recognised that if art 18 were to render South Africa bound by the terms of a treaty (which is subject to ratification) merely on signature by the executive, this would be inconsistent with s 231(2) of the Constitution, which makes clear that South Africa is only bound by an international agreement if the international law agreement was approved by Parliament.\textsuperscript{90} But, given the effect of art 18, and the manner in which the Court dealt with that in the SADC Tribunal matter, the high court’s statement in the ICC Withdrawal decision — that signature ‘has no direct legal consequences’\textsuperscript{91} — is too emphatic, and its statement requires some qualification. It would be better to say that as a matter of international law, signature has such legal effects as provided for in the agreement signed, as read together with art 18 (which, by virtue of s 232, is part of our law).

2 The executive’s and legislature’s delineated functions when binding South Africa to international agreements

Our consideration as to the effect of giving the executive the power to negotiate and sign international agreements leads to a consideration of the second key aspect of s 231. The section creates a delineation of functions between the executive and legislature in relation to binding South Africa to international agreements. In particular, if after negotiating and signing an international agreement, the executive wishes South Africa to agree to be bound by an international agreement, the executive must first table the international agreement before both houses of Parliament for their consideration and approval (s 231(2)). As is made clear in the ICC Withdrawal case:

the executive does not have the power to bind South Africa to \{an international\} agreement. The binding power comes only once parliament has approved the agreement on behalf of the people of South Africa as their elected representative. It appears that it is a deliberate constitutional scheme that the executive must ordinarily go to parliament (the representative of the people) to get authority to do that which the executive does not already have authority to do.\textsuperscript{92}

\textsuperscript{89} To an extent this elucidation of the limited effect of art 18, appears to be inconsistent with what is said earlier in the judgment (albeit in passing) that appears to suggest that the Court viewed the effect of mere signature of the Protocol would, by virtue of art 18, meant that ‘if an individual were to take South Africa to the Tribunal now, South Africa would be obligated to object to or resist its jurisdiction in obedience to the dictates of Article 18.’ (para 39). The Court does not attempt to explain why this would be the effect of the limited obligation created by art 18, and the Court’s suggestion is inconsistent with its own later pronouncement as to the limited effect of art 18, and seems to fall foul of the fallacy warned against by Aust, who opines in his work on the law of treaties that, ‘Article 18 requires a state ‘to refrain from acts that would defeat the object and purpose of a treaty’ when … it has signed the treaty … subject to ratification, until it shall have made its intention clear not to become a party to the treaty … It is sometimes argued (especially by law students) that a state that has not yet even ratified a treaty must, in accordance with art 18, nevertheless comply with it or, at least, do nothing inconsistent with its provisions. This is certainly wrong, since the act of ratification would then have little or no purpose, the obligation to perform the treaty then not being dependent on ratification and entry into force.’ (A Aust Modern Treaty Law and Practice (3\textsuperscript{rd} ed, 2013) at 107, (emphasis added.).

\textsuperscript{90} Save in the limited circumstances governed by s 231(3).

\textsuperscript{91} ICC Withdrawal (note 71 above) at para 47.

\textsuperscript{92} ICC Withdrawal (note 71 above) at para 55, emphasis added.
As Ngcobo CJ held in *Glenister*, ‘[u]nder our Constitution, therefore, the actions of the executive in negotiating and signing an international agreement do not result in a binding agreement. Legislative action is required before an international agreement can bind the Republic.’\(^93\)

As the high court held in *ICC Withdrawal*, the corollary to requiring parliamentary approval to make an international agreement binding is that this equally requires parliamentary approval before the executive can give notice of withdrawing South Africa from an agreement that Parliament has previously approved. There is a limited exception to the need to approach Parliament for approval, in respect of agreements that fall within the ambit of s 231(3), which we deal with below.

3 Public participation in the approval of international agreements

The third important aspect of s 231’s scheme flows from the requirement for parliamentary involvement in s 231(2). That is the need for public participation in that approval process. While the Constitutional Court has not expressly pronounced on this issue, it flows from the express obligations in the Constitution. The Constitution obligates both houses of Parliament to facilitate public participation in their legislative and other activities.\(^94\) Therefore, by requiring international agreements to be tabled before Parliament for its approval, the Constitution envisages that Parliament would generally be obligated to conduct appropriate public participation processes when considering whether to approve an international agreement.\(^95\)

The high court took account of this in the *Earthlife Africa* decision (which dealt with procurement of nuclear power, and the international agreements entered into pursuant thereto).\(^96\) In finding that the government had acted unlawfully in tabling an international agreement with Russia in respect of nuclear procurement, not under s 231(2), but under s 231(3) (which as we discuss below dispenses with the need for parliamentary approval), the court held that ‘tabling of an [inter-governmental agreement] under s 231(3) permits the executive to bind South Africa to an agreement without parliamentary approval or the public participation that often accompanies any such parliamentary-approval process.’\(^97\)

The fact that s 231(2) may require Parliament to undertake a public participation process when considering whether to approve an international agreement takes on particular import given the Court’s consideration, in the *SADC Tribunal* matter, of the issue of whether the executive was under any obligation to consult with the public when negotiating and signing international agreements. In the *SADC Tribunal* matter, one of the amici had argued that the executive bore a general constitutional duty to consult with the public prior to signing international agreements.\(^98\) The Court was emphatic in rejecting this submission, referencing the fact that public consultation was specifically provided for in the Constitution as a parliamentary obligation, not an executive obligation. The Court held that:

Public participation in the law-making process is a requirement, specifically provided for in our Constitution, that must be met by our law-making institutions. But, participatory democracy is

\(^{93}\) *Glenister* (note 1 above) at para 95, emphasis added.

\(^{94}\) Sections 57(1)(b) and 72(1)(a) of the Constitution.


\(^{96}\) *Earthlife Africa* ibid.

\(^{97}\) Emphasis added.

\(^{98}\) *SADC Tribunal* (note 3 above) at para 86.
not provided for in similar terms in relation to the exercise of presidential or executive power. The negotiation and signing of international agreements like the impugned Protocol is an exercise of executive power. And there is no legal provision or principle that even remotely imposes an obligation on the Executive to invite the public to participate in its decision-making processes as proposed. Desirable though it might be, we would be straining even the scheme of the Constitution if we were to elevate public consultation to the level of a requirement. It is always open to the Executive, whenever it deems it fitting to do so, to involve the public. But a failure to do so, however enriching to the decision-making process it might otherwise have been, can never rise to the level of a failure to fulfil a constitutional obligation to consult the public.99

4 The intersection of domestic and international law

The fourth aspect of s 231 that bears careful consideration is the interplay between domestic and international law that s 231(2) represents. Whether an international agreement is binding on South Africa, qua sovereign state on the international plane, is a question ultimately answered, not by South Africa’s domestic law (the domestic law of only one of the parties to such agreement), but by international law.100 Therefore, correctly understood s 231(2) should be interpreted as providing the jurisdictional requirements in domestic law that specify when, as a matter of domestic law, the government (the executive together with Parliament) may take steps on the international plane to ensure that South Africa is bound as a matter of international law. This is precisely why s 231(2), quite correctly, refers to an international agreement binding South Africa ‘only after’ it has been approved by resolution in both houses of Parliament, rather than stating that Parliament ratifies the international agreement, or binds South Africa, itself. Section 231(2) establishes the jurisdictional requirement (parliamentary approval of the international agreement) that is required by our law before the executive may take the necessary steps on the international plane to notify other state parties (by means of ratification) that South Africa agrees to be bound by the relevant international agreement. As a matter of international law, it is only once other state parties have been notified that South Africa will in fact be bound by that international agreement. If and when both houses of

99 SADC Tribunal (note 3 above) at para 87.
100 For example, the Vienna Convention arts 27 and 46; Aust (note 90 above) at 274; MN Shaw International Law 8th ed (2017) at 712; and Land and Marine Boundary between Cameroon and Nigeria (Cameroon v. Nigeria) 2000 ICJ Reports 303, where the International Court of Justice (ICJ), was faced with the submission by Nigeria that it was not bound by an international agreement with Cameroon (the Maroua Declaration, 1975) because the agreement was invalid since Nigeria’s domestic constitutional requirements for the entering into of international agreements had not been complied with. However, the ICJ determined the validity of the Declaration having regard to the requirements of art 46 of the Vienna Convention, which made clear that a ‘state may not invoke the fact that its consent to be bound by a treaty has been expressed in violation of a provision of its internal law regarding competence to conclude treaties as invalidating its consent unless that violation was manifest and concerned a rule of its internal law of fundamental importance.’ The Court noted that the Nigerian head of state had signed the Declaration and that ‘Nigeria further argues that Cameroon knew, or ought to have known, that the Head of State of Nigeria had no power legally to bind Nigeria without consulting the Nigerian Government.’ (at para 266). However, the Court held at para 266 that ‘there is no general legal obligation for States to keep themselves informed of legislative and constitutional developments in other States which are or may become important for the international relations of these States.’ Therefore, the Court found that since it was the head of state that signed the Declaration and it is accept by international law that heads of state ‘are considered as representing their State for the purpose of performing all acts relating to the conclusion of a treaty’, any domestic constitutional limitation on the Nigerian head of state’s capacity to enter into the Declaration was not ‘manifest’ (see para 265–266).
Parliament approve an international agreement, as required by s 231(2), then South Africa can be bound to the agreement as a matter of international law. However, the structure of s 231 suggests that there is usually a further step in the process to complete South Africa’s journey towards being bound as a matter of international law. That further step is (depending on the terms of the treaty in question) for the executive (normally the Minister of International Relations) formally to give notice that South Africa agrees to be bound by the international agreement. This typically occurs by depositing an instrument of ratification with the relevant body designated in the international agreement. For instance, the treaty at issue in the SADC Tribunal matter, the 2014 Tribunal Protocol, required that states that had signed the international agreement would then need to ratify the agreement after compliance with their own constitutional procedures, and it was then a requirement that ‘all Instruments of Ratification and Accession shall be deposited with the Executive Secretary of SADC who shall transmit certified copies to all Member States.’ And, as noted by the court in the ICC Withdrawal case, ‘prior parliamentary approval is required before instruments of ratification may be deposited with the United Nations.’

Although s 231 does not deal with this expressly, it seems clear from the structure and nature of s 231, and the courts’ analysis of the section that, as discussed above, once Parliament has approved an international agreement, so that it may become binding under international law, the executive is then obligated to take the necessary steps to notify the other state parties to the agreement, generally by depositing an instrument of ratification. Therefore, it would certainly be unlawful for the executive to fail to deposit an instrument of ratification once Parliament had approved the international agreement.

The domestic and international law steps that are necessary to bind South Africa to an international agreement are well illustrated by, and will often be set out in, an instrument of ratification deposited by South Africa. By way of example, the instrument of ratification in respect of the SADC Protocol on Culture, Information and Sport, provided as follows:

WHEREAS the Southern African Development Community (SADC) Protocol on Culture, Information and Sport (hereinafter referred to as “the Protocol”) was adopted at Blantyre, Malawi on 14 August 2001;

AND WHEREAS the Protocol was signed on behalf of the Government of the Republic of South Africa on 14 August 2001;

AND WHEREAS Article 38 of the Protocol provides for ratification thereof;

AND WHEREAS the Government of the Republic of South Africa desires to become a Party to the Protocol;

AND WHEREAS ratification of the Protocol was approved by the South African Parliament in accordance with the requirements of South African law;

NOW THEREFORE 1, NKOSAZANA CLARICE Dlamini Zuma, MINISTER OF FOREIGN AFFAIRS OF THE REPUBLIC OF SOUTH AFRICA, declare that the Government of the Republic of South Africa, having considered the Protocol, hereby confirms and ratifies the same.

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101 Glenister (note 1 above) at para 181.
102 ICC Withdrawal (note 71 above) para 51. Similarly, international agreements, in addition to allowing for ratification, may also allow for accession. This is the process of formally agreeing to be bound by a treaty (by depositing an instrument of accession) to which a state had not been party to the negotiation of and therefore had not signed.
103 Article 55(1) of 2014 Protocol.
104 ICC Withdrawal (note 71 above) at para 51.
105 A copy of the instrument of ratification is on file with the authors.
When can an international agreement be made binding absent parliamentary approval?

We now come to the next important aspect of s 231; the limited exception it includes for ensuring that international agreements are only made binding after they are approved by Parliament. Section 231(3) provides that, ‘[a]n international agreement of a technical, administrative or executive nature, or an agreement which does not require either ratification or accession, entered into by the national executive, binds the Republic without approval by the National Assembly and the National Council of Provinces, but must be tabled in the Assembly and the Council within a reasonable time.’

The Constitutional Court has not yet definitively pronounced on how s 231(3) should be interpreted or how the interplay between sub-ss 231(2) and (3) operates. However, the interpretation and application of s 231(3) were directly at issue in *Earthlife Africa*. The court’s interpretation of s 231(3) formed the basis for its declarations of invalidity regarding the tabling of three international agreements (one with Russia, one with America, and one with South Korea). The court held that s 231(3) permits the executive to bind South Africa to a small subset of international agreements ‘without parliamentary approval or the public participation that often accompanies any such parliamentary approval process, by tabling the agreement within a reasonable time.’ The court emphasised that the international agreements that can be tabled under s 231(3) are —

a limited subset of run of the mill agreements (or as Professor Dugard puts it, agreements ‘of a routine nature, flowing from daily activities of government departments’) which would not generally engage or warrant the focused attention or interest of Parliament.

Thus, international agreements that are not run-of-the-mill and routine and would warrant Parliament’s attention would have to be approved by Parliament in terms of s 231(2) before they can bind South Africa. International agreements which would have any effect on the public or on any citizens’ domestic or international rights, would evidently warrant parliamentary attention, and would therefore have to be tabled under s 231(2). The executive could only table an agreement under s 231(3), and thus bypass the need for parliamentary approval and the concomitant public participation, if the agreement is of such a nature that there would be no rational need to consult with the public as to its content. Of course, if the executive were to bypass s 231(2)’s requirement for parliamentary approval (and therefore public participation), by tabling an agreement under s 231(3), which does require Parliament’s attention, then this would be unconstitutional and should be set aside by the courts. This is precisely what occurred in *Earthlife Africa*.

At the centre of the *Earthlife Africa* matter, was an international intergovernmental agreement between South Africa and Russia (the Russian IGA) which provided for the procurement of nuclear power. Although the government sought to argue that the Russian IGA was merely a broad, non-specific, cooperation agreement, the terms of the agreement gave the lie to these assertions. As the high court found, the plain terms of the agreement set it apart from a mere cooperation agreement (in contradistinction to nuclear cooperation agreements that South Africa had signed with other states). The Russian IGA was truly remarkable for its content: it included a number of terms giving firm commitments that would have required South Africa to use Russia to construct a new fleet of nuclear power plants, to the exclusion of third party...
states (save by Russian agreement), with the agreement to favourable tax arrangements and an indemnification of Russia in the event of any harm arising from the operation or construction of the nuclear power plants.\textsuperscript{109} Despite these significant and far-reaching terms, the Russian IGA did not expressly provide for ratification (the depositing of instruments of ratification). Rather, the IGA provided that ‘[t]his Agreement shall enter into force on the date of the receipt through diplomatic channels of the final written notification of the completion by the Parties of internal government procedures necessary for its entry into force.’\textsuperscript{110}

The high court had no difficulty in holding that the content of the international agreement made clear that it was not an agreement ‘of a technical, administrative or executive nature’. Therefore, the court held that the Russian IGA had to be tabled before Parliament for approval under s 231(2) (and could not be tabled under s 231(3)).\textsuperscript{111} Notwithstanding that the Russian IGA was a far-reaching and substantial international agreement that would have committed South Africa to procure power plants from Russia, at a cost that could have exceeded R1 trillion, the government had nevertheless sought to table the agreement before Parliament for mere noting under s 231(3), thus bypassing parliamentary oversight that is normally required, and therefore public participation, entailed in the s 231(2) procedure. This was evidently unconstitutional, and thus was set aside by the court. The high court emphasised that requiring the agreements such as the Russian IGA to be tabled under s 231(2) for parliamentary approval, ‘would give optimal effect to the fundamental constitutional principles of the separation of powers, open and accountable government, and participatory democracy.’ The government did not appeal this decision, presumably accepting that it had been unlawful to use s 231(3) to seek to circumvent the constitutionally provided process for making treaties such as the Russian IGA binding.

Even when the executive is entitled to make use of s 231(3) to bind South Africa to an international agreement absent parliamentary approval, the section does not allow it to dispense with Parliament completely. Section 231(3) provides that if the executive wishes to make an international agreement that falls within s 231(3) binding on South Africa it must still table the international agreement before Parliament within a reasonable time.\textsuperscript{112} In Earthlife Africa, the court held that the tabling before Parliament in a reasonable time is a jurisdictional requirement for the executive to exercise the power under s 231(3).\textsuperscript{113} There are sound practical and principled reasons for this. In accordance with the separation of powers, the tabling allows Parliament to scrutinise the relevant agreement to ensure that the executive has not mischaracterised an international agreement, in order to bypass the s 231(2) approval process. This gives due regard to the constitutional principles of openness and accountability.\textsuperscript{114} And as the Earthlife Africa case confirms, the risk of such an attempted bypass is not imaginary. The court held that if there has been a failure to table an agreement in a reasonable time then this would mean that the executive had acted unconstitutionally, and the tabling under

\textsuperscript{109} Earthlife Africa (note 96 above) at para 114.
\textsuperscript{110} Russian IGA art 17.1. A copy of the Russian IGA is on file with the authors.
\textsuperscript{111} Earthlife Africa (note 96 above) at para 114.
\textsuperscript{112} Section 231(3), and Earthlife Africa (note 96 above) at para 126.
\textsuperscript{113} Earthlife Africa (note 96 above) at para 126.
\textsuperscript{114} Ibid at para 126, referring to s 41 of the Constitution. The court noted that ‘Section 41(1) requires all spheres of government and all organs of state within each sphere to “provide effective, transparent, accountable and coherent government for the Republic as a whole” whilst s 1 of the Constitution sets out these attributes as founding values in a multiparty system of democratic government.’
s 231(3) would be unconstitutional. It was on this basis that the court set aside the tabling of international cooperation agreements with the US and South Korea (these agreements, years after they had been signed, had been very belatedly tabled together with the Russian IGA, in a manner that the applicants in the *Earthlife Africa* argued, was meant to act as window-dressing to obscure the substantive and unique commitments made to Russia in the Russian IGA). The US agreement was only tabled 20 years after it was signed, and the South Korean agreement was only tabled five years after being signed. Given these significant delays, the court found that these agreements were accordingly not tabled within a reasonable time.\(^\text{115}\) It accordingly declared the tabling under s 231(3) of both agreements to be unconstitutional and unlawful and set aside the tabling.

In *Earthlife Africa*, although the court did not wish to prescribe to the government what if any steps it should take consequent upon the setting aside of the tabling of the US and South Korean IGAs, it opined that it may well have been open to the government to utilise the more onerous procedure set out in s 231(2) of the Constitution. The court held that in its ‘view that procedure is non-exclusive in the sense that the executive is not precluded from utilising its provisions in relation to treaties which fall within the ambit of s 231(3).’\(^\text{116}\) The court’s conclusion may be supported on the following reasoning.

The constitutional structure of s 231 creates two procedures for tabling international agreements before Parliament in order to meet the domestic constitutional requirements for international agreements to be made binding. If the executive wishes to make use of the more expedited parliamentary procedure (under s 231(3)), created to avoid unnecessary delay (and assuming that in substance the agreement falls within the ambit of s 231(3) as an everyday bureaucratic agreement), then it is required to table the agreement within a reasonable time. If the government does not table an international agreement, which would otherwise fall within s 231(3) in a reasonable time, then it can no longer make use of s 231(3)’s expedited procedure, and must use s 231(2). This is so since s 231(2) applies to all international agreements, save for those agreements ‘referred to in subsection (3)’. The type of agreements referred in 231(3) are those that are of a ‘technical, administrative or executive nature, or [agreements] which [do] not require either ratification or accession’ but which have been tabled ‘within a reasonable time’.

6 *The domestication of international agreements and the SADC Tribunal decision*

Section 231(2) and (3) only deals with the domestic constitutional obligations that must be complied with in order for international agreements to be made binding on South Africa on the international plane (for instance, the need for parliamentary approval). Section 231(4) expressly provides for domestication of international agreements. Generally, speaking, in terms

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\(^{115}\) *Earthlife Africa* (note 96 above) at para 128.

\(^{116}\) *Earthlife Africa* (note 96 above) at para 137.
of s 231(4), to form part of our law an international agreement must be enacted domestically by the passing of legislation by Parliament. As the court held in the ICC Withdrawal case, ‘once parliament approves the agreement, internationally the country becomes bound by that agreement. Domestically, the process is completed by Parliament enacting such international agreement as national law in terms of s 231(4).

At issue in ICC Withdrawal case was the Rome Statute of the ICC, which after South Africa had ratified it, had been given domestic effect by the enacting of the ICC Act. However, s 231(4) of the Constitution provides an exception to the need for Parliament to pass domestic legislation to incorporate international agreements into South Africa law. It provides that ‘a self-executing provision of an agreement that has been approved by Parliament is law in the Republic unless it is inconsistent with the Constitution or an Act of Parliament.’ The exception is limited to international agreements that have been approved by Parliament. This qualification is important. It means that only international treaties, and their provisions, approved by Parliament in terms of s 231(2), may automatically become part of our law, regardless of whether they have self-executing provisions. Thus, a section-231(3) treaty, which binds South Africa absent parliamentary approval, and has merely been tabled before Parliament under s 231(3) within a reasonable time for notification, cannot form part of our law without legislation, regardless of whether its provisions may be considered to be self-executing.

This background then brings us to an important issue that arises from the way that the Constitutional Court, in the SADC Tribunal matter, treated the President’s conduct that was inconsistent with South Africa’s treaty obligations. The nub of the issue is this. If an international agreement is not incorporated into our law by legislation in terms of s 231(4), and assuming that it is not self-executing, then absent such domestic legislative step to incorporate the treaty (or self-execution of a treaty that has been approved by Parliament, as per s 231(4)), are domestic rights and obligations created by the treaty? The answer that appears to be given by the Court in Glenister is, ‘no’. The majority held that:

In our view the main force of s 231(2) is directed at the Republic’s legal obligations under international law, rather than transforming the rights and obligations contained in international agreements into home-grown constitutional rights and obligations. Even though the section provides that the agreement ‘binds the Republic’, and Parliament exercises the Republic’s legislative power, which it must do in accordance with and within the limits of the Constitution, the provision must be read in conjunction with the other provisions within s 231. Here, s 231(4) is of particular significance. It provides that an international agreement ‘becomes law in the Republic when it is enacted into law by national legislation’. The fact that s 231(4) expressly creates a path for the domestication of international agreements may be an indication that

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117 Section 231(4) provides that ‘[a]ny international agreement becomes law in the Republic when it is enacted into law by national legislation; but a self-executing provision of an agreement that has been approved by Parliament is law in the Republic unless it is inconsistent with the Constitution or an Act of Parliament.’
118 See Glenister (note 1 above) at para 181.
119 ICC Withdrawal (note 71 above) at para 35.
120 ICC Withdrawal (note 71 above) at para 9.
121 For a discussion as to when a treaty will be considered to be self-executing see J Dugard & A Coutsoudis, ‘The Place of International Law in South African Municipal Law’ in J Dugard, M du Plessis, T Maluwa & D Tladi (eds) Dugard’s International Law (5th ed, 2018) at 81–86.
s 231(2) cannot, without more, have the effect of giving binding internal constitutional force to agreements merely because Parliament has approved them.\footnote{Glenister (note 1 above) at para 181. For the more emphatic statement, as to the fact that unincorporated treaties do not create domestic rights and obligations see the minority decision at paras 89–97 (cautioning, in relation on UK and Australian authority that ‘treating international conventions as interpretive aids does not entail giving them the status of domestic law in the Republic. To treat them as creating domestic rights and obligations is tantamount to “incorporat[ing] the provisions of the unincorporated convention into our municipal law by the back door”).}

The Court’s reasoning is consistent with the structure of s 231, and the requirement in s 231(4). Section 231(4) creates an express avenue for the domestication of international agreements. Of course, the Court in Glenister was only broadly describing the position under s 231. It was careful, when setting out its interpretation of the structure of s 231 not to be too definitive (‘may be an indication’), nor did it wish to rule out exceptions or nuances to its general proposition (‘cannot, without more,’ — the ‘more’ that may prove an exception to the tentative principle annunciate, is not explained, but this has been left open for future decision [emphasis added]).

In the Torture Docket decision, the Court in its introductory summary of the place of international law in the Constitution, pointed out that, in contradiction to customary international law, ‘international treaty law only becomes law in the Republic once enacted into domestic legislation’.\footnote{Torture Docket decision (note 12 above) at para 24.} But the Court’s decision in SADC Tribunal provides a certain nuance to that simple assertion. In the SADC Tribunal decision, the Court held that an organ of state that acts in violation of South Africa’s international law obligations, even where those obligations have not been domesticated by legislation, acts unlawfully and unconstitutionally. The organ of state’s conduct will therefore be reviewable before South African courts. The Court’s findings in relation to this unlawfulness were discussed in part II above, and will be further analysed in part IV below. In summary, the Court made it clear that ‘[a]ll presidential or executive powers must always be exercised in a way that is consistent with [inter alia] international law obligations’.\footnote{SADC Tribunal (note 3 above) at para 3} Moreover, the Court also held that the obligation to comply with binding international treaties, even when unincorporated, is sourced, inter alia, in the obligations created by s 231(2). The Court held that the President’s actions (as the representative of South Africa) that were in violation of the SADC Treaty which incorporated the Tribunal Protocol were, inter alia, unconstitutional since ‘[b]oth Houses of our Parliament resolved, in terms of the predecessor of s 231(2) of our Constitution, to ratify the Treaty. For this reason, no constitutional office-bearer, including our President may act, on behalf of the State, contrary to its provisions.’\footnote{SADC Tribunal (note 3 above) at para 76, emphasis added} In other words, implicit in s 231(2) is the fact that it is unlawful and unconstitutional to act in violation of international agreements made binding on the international plane, by Parliament’s approval.

To properly contextualise the Court’s decision in the SADC Tribunal matter, it is important to appreciate that the Court was faced with actions that were found to be inconsistent with international agreements, that while binding on South Africa, had not been incorporated into our law by legislation. There is no domestic legislation that has been enacted to give effect to the SADC Treaty incorporating the Tribunal Protocol. Similarly, there was no suggestion in the judgment that either the Treaty or the Protocol were given effect to by virtue of complying
with the requirements for self-executing treaties in s 231(4). This is not surprising. The 2000 Protocol, which provided for the Tribunal’s jurisdiction over individual complaints (and forms an integral part of the SADC Treaty) could not have been automatically part of our law in terms of s 231(4), even if one were to argue that its provisions may be self-executing. This is so because neither the 2000 Protocol, nor the Amendment to the Treaty to incorporate the 2000 Protocol into the Treaty (in terms of art 16, as amended), was ever approved by Parliament. Instead, as recognised by the Constitutional Court earlier in Fick, the Summit took a decision in 2002 to bring the 2000 Protocol (which currently provides for the functioning and jurisdiction of the Tribunal) into operation by amending the SADC Treaty to incorporate 2000 Protocol, thus bringing it into force absent ratification by member states. The Summit did this by using its power, provided in the SADC Treaty to amend the Treaty and to amend Protocols. The Summit chose to exercise this power because there had been insufficient ratification to bring the 2000 Protocol into force (indeed South Africa had not ratified the 2000 Protocol), so the ratification requirement in the 2000 Protocol was removed in terms of the Summit’s amendment of the Treaty and the 2000 Protocol. This may all sound terribly complicated, but in simple words: the SADC Tribunal was amended by the SADC Summit in terms of an amendment approved by the Summit, rather than by way of an international agreement approved by Parliament.

Thus, despite the relevant treaty obligations not being domesticated in terms of s 231(4), the Court held that the President’s conduct that violated (or more appropriately, caused South Africa to violate) these obligations was unlawful, and domestically reviewable in South Africa.

One might reconcile the approach taken by the Court in Glenister (and the terms of s 231(4)) and the decision in SADC Tribunal on the basis that in SADC Tribunal the Court was not concerned with whether the SADC Treaty and 2000 Tribunal Protocol, neither of which had been domesticated by legislation, created domestic rights and obligations in South Africa. The Court was focused on a different issue. The Court was engaged primarily with the question of whether the President, in conducting South Africa’s international relations (participating in an international organisation and negotiating and signing an international agreement on behalf of South Africa) may act in such a way as to cause South Africa to breach its international obligations. In essence, for the reasons stated above, the Court held that so to act would be unconstitutional. That was for reasons less to do with whether international treaty law can create domestic rights, but rather the domestic demands of our Constitution: because all exercises of public power are subject to the Constitution and the rule of law, an organ of state exercising such power, even when representing South Africa on the international plane, cannot lawfully act inconsistently with South Africa international obligations. The Court made clear that the principle (that it was unconstitutional to violate international agreements binding on South Africa) applied to all exercises of power, not merely the conducting of international relations.

The finding that it is unconstitutional for the executive to exercise public power in a manner that is inconsistent with South Africa’s international law treaty obligations did not in truth domesticate the international treaty and make the obligations, in toto, part of our law (which the Court in Glenister suggested would normally require domestic legislation as required by

126 Fick (note 36 above) at para 9.
127 As noted above in footnote 37, the Agreement amending the Protocol on the Tribunal (2002) provided that the 2000 Protocol was amended to enter into force upon the adoption of the Agreement Amending the Treaty of the SADC on 14 August 2001. See also Fick (note 36 above) at paras 9, 10; and Fick (SCA) (note 37 above) at paras 35, 36.
128 SADC Tribunal (note 3 above) at paras 3, 48, 75.
s 231(4)). Rather it effectively ensures that the lawful exercise of power, which must comply with the principle of legality (and the implied obligation in s 231(2) not to violate international agreements that Parliament has approved), cannot be exercised in a way that would cause a violation of international obligations binding on South Africa. Thus, one should view the SADC Tribunal decision as providing a fuller more nuanced treatment of the question of when organs of state can constitutionally act in a way that is inconsistent with South Africa’s international law obligations, even when not incorporated, given specific facts with which the Court was faced. This is certainly not in conflict with, but rather provides greater detail to, the broad outline of the constitutional architecture created by s 231 enunciated in Glenister.

C When will violation of South Africa’s international law obligations be unconstitutional? Is a Bill of Rights hook required?

In the SADC Tribunal matter the Court held that the executive had an obligation not to act in violation of South Africa’s international obligations. The source of this constitutional obligation is discussed above. However, a question that needs to be considered is whether, for actions that are inconsistent with South Africa’s international obligations, it is necessary to find further that the actions are also in breach of a domestic constitutional obligation to respect, fulfil, and protect the rights in the Bill of Rights, as provided in s 7(2)? In other words, is some Bill of Rights hook required, for our courts to find executive action unconstitutional because it is in conflict with South Africa’s international obligations.

Again, SADC Tribunal and Glenister point to the answers. The SADC Tribunal case can be seen as the latest in a line of international-law-centric decisions by the Constitution. Glenister is its obvious forerunner. Glenister dealt with the government’s failure to create a sufficiently independent corruption-fighting unit. In that matter the Constitutional Court grappled with the manner in which actions by the state, not in accordance with international law, would ground a challenge to the constitutionality of the government’s actions. The Court ground this obligation on South Africa’s international law obligations. But, it did so through the lens of the state’s obligation to protect, promote, and fulfil the rights in the Bill of Rights, as provided for in s 7(2) of the Bill of Rights. It held this section was implicated because corruption negatively impacts all the rights in the Bill of Rights. Thus, the Court reasoned that when determining whether the state had acted reasonably in taking steps to protect and fulfil the rights in the Bill of Rights, the Court could look to South Africa’s international law obligations in relation to corruption fighting. It was within that context that the Court had regard for the government’s failure to fulfil South Africa’s international law obligations. As the Court held —

our Constitution takes into its very heart obligations to which the Republic, through the solemn resolution of Parliament, has acceded, and which are binding on the Republic in international law, and makes them the measures of the State’s conduct in fulfilling its obligations in relation to the Bill of Rights.129

It was therefore within this context that the Court held that the failure to create a corruption fighting unit was in violation of s 7(2)’s requirement to respect and fulfil the rights in the Bill of Rights.

In the SADC Tribunal case the Court found that the right of access to courts (protected by s 34 of the Bill of Rights and also given effect to by the 2000 Tribunal Protocol) was

129 Glenister (note 1 above) at para 178, emphasis added.
implicated, because the effect of suspending the Tribunal meant that citizens that previously had access to this regional international body no longer did (and the 2014 Protocol, which had been signed but not ratified, would, if it were to come into force, remove permanently the right of individuals to bring complaints before the Tribunal). However, the Court made clear that it was unconstitutional for the government to violate South Africa’s international law obligations, not merely when rights in the Bill of Rights are implicated, or where there is a failure to respect, protect, promote and fulfil those rights. One can see at various points in the Court’s decision that it emphasises that the unlawfulness and unconstitutionality of the President’s conduct flows both (and separately) from a failure to comply with the Bill of Rights and to act in accordance with South Africa’s international law obligations. The Court was clear that the President’s actions that violated international law (in particular the obligations in the SADC Treaty incorporating the 2000 Tribunal Protocol)\(^\text{130}\) were unconstitutional, because they violated the principle of legality flowing from the rule of law enshrined in s 1(c), and because they violated s 232(2).\(^\text{131}\) This was in addition to being unconstitutional for failure to protect, promote and fulfil the rights in the Bill of Rights.\(^\text{132}\)

This suggests that where the government’s actions are inconsistent with and cause a violation of South Africa’s international law obligations, although often one would expect the rights in the Bill of Rights to be implicated (as was the case in \textit{Glenister} and \textit{SADC Tribunal}), this is not a necessary requirement for a finding that the conduct is unconstitutional. Hence, even if no right in the Bill of Rights were at issue, a breach of international obligations would be unconstitutional. Why do we say this?

First, the Court makes plain that this is how it interprets the effect of the requirement in s 231(2) that international treaties become binding on the Republic after Parliament has approved them. The Court views this section as creating an (implicit) obligation on the government not to act in breach of international agreements approved by Parliament. Thus, it states that because both houses of our Parliament approved the SADC Treaty, in terms of s 231(2), ‘no constitutional office-bearer, including our President may act, on behalf of the State, contrary to its provisions.’ There is no suggestion that some specific Bill of Rights violation is required.

Second, as noted above, customary international law is made part of the law of South Africa by virtue of s 232, thus evidently it would be unlawful (and in breach of the principle of

\(^{130}\) For a discussion of why the Court held that the Treaty had been violated see \textit{SADC Tribunal} (note 3 above) at paras 51–52. The Court drew attention to its previous finding in \textit{Fick} as to the relevant international law obligations that the SADC Treaty placed on South Africa: ‘The Amended Treaty, incorporating the Tribunal Protocol, places an international law obligation on South Africa to ensure that its citizens have access to the Tribunal and that its decisions are enforced.’ (\textit{SADC Tribunal} (note 3 above) at para 77, quoting from \textit{Fick} (note 36 above) at para 69. And the \textit{SADC Tribunal} high court decision (note 39 above), the court held at para 63 that, ‘[w]e have referred to the relevant articles of the Treaty and especially article 9(1)(g), which establishes the SADC Tribunal as an integral organ of SADC. We have referred to the founding principles relating to “human rights, democracy and the Rule of Law”, and the obligation of Member States to act in accordance with them as per article 4(c). It is clear that Member States are also precluded from “taking any measure likely to jeopardise the sustenance of its principles, the achievement of its objectives and the implementation of the provisions of this Treaty”. (Article 6(1)).’ And the Court went on to find that ‘any act which detracted from the SADC’s Tribunal’s exercise of its human rights jurisdiction, at the instance of individuals, was inconsistent with the SADC Treaty itself, and violated the Rule of Law.’ (Para 64.)

\(^{131}\) \textit{SADC Tribunal} (note 3 above) at paras 71, 79.

\(^{132}\) \textit{SADC Tribunal} (note 3 above) at paras 71, 79.
legality) for government to act in a way that is in violation of customary international law, since it forms part of our law. Interestingly, this may also have implications for the government’s obligation not to exercise public power in a way that leads to a violation of international treaty obligations. The Court held that art 26 of the Vienna Convention — which provides that ‘[e]very treaty in force is binding upon the parties to it and must be performed by them in good faith’ — was part of customary international law. 133 That being so, it is a requirement of our domestic law, by virtue of s 232, that treaty obligations are binding (when the treaty is in force) and that those obligations must be performed, and performed in good faith. In the SADC Tribunal matter, the Court appeared, therefore, to reason that since this customary international law obligation was part of our law and binding on the government, it would be an unlawful violation for the government, as the representative of South Africa, to then act in a way that failed to ensure that South Africa was in good faith complying with all its binding treaty obligations. This appeared from the fact that, when the Court chronicled the grounds for finding that the President’s conduct in signing the 2014 Protocol had been unlawful, it expressly pointed out that ‘[the President] may also not act as if article 26 of the Vienna Convention, duly undergirded by customary international law, is not binding.’ 134 And the Court held that, ‘it cannot be overemphasised that [the President’s] conduct was also unlawful in that he failed to act in good faith and in pursuit of the object and purpose of the Treaty we have bound ourselves to [as required by customary international law as codified in art 26].’ 135

Third, the Court made it clear that the principle of legality is also violated where there is a failure to comply with international treaty obligations. The Court held that the President in signing the 2014 Protocol that provided for the replacement of the 2000 Protocol, which was an integral part of the Treaty, was in violation of the Treaty, since the proper amendment procedure in the Treaty had not been followed. This therefore rendered the President’s decision ‘unlawful’ and ‘irrational’. 136 Similarly, the Court found that the suspension and non-appointment of judges of the Tribunal had been unlawful — since the Summit, which the President had participated in as a member thereof, did not have the power to fail to appoint judges to the Tribunal — the Court held that they were obligated to make such appointments. 137 It was on this basis that the Court expressly held that the President’s decision

133 SADC Tribunal (note 3 above) at para 39.
134 SADC Tribunal (note 3 above) at para 79.
135 For example, see SADC Tribunal (note 3 above) at para 56, emphasis added.
136 SADC Tribunal (note 3 above) at para 56, where the Court held that: ‘Our President thus acted unlawfully by following an impermissible or irregular procedure. Worse still, not only did he not have the power to not appoint or renew the terms of Members of the Tribunal but also lacked the authority to suspend its operations. This illegality of his conduct also stems from purporting to exercise powers he does not have. And it cannot be overemphasised that his conduct was also unlawful in that he failed to act in good faith and in pursuit of the object and purpose of the Treaty we have bound ourselves to.’ (our emphasis)
137 SADC Tribunal (note 3 above) para 56

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violated the doctrine of legality, flowing from the rule of law, as enshrined by s 1(c) of the Constitution.\textsuperscript{138}

Fourth, of course, we should not forget that the Constitution provides expressly in s 199(5) that the security forces must act in accordance with international law, and failing to do so would violate s 199(5) and therefore be unconstitutional.

In none of these instances is it a necessary precondition that a right in the Bill of Rights is affected or violated, in order to make it unconstitutional for government to act in a way that is inconsistent with South Africa’s international law obligations. Therefore, although in the \textit{SADC Tribunal} decision, s 7(2) (the state’s obligation to respect, protect, promote and fulfil the rights of the Bill of Rights) was also violated, that is not a necessary prerequisite for governmental conduct which causes South Africa to violate international law obligations to be unlawful and constitutional.\textsuperscript{139} Naturally, as is often the case, a violation of international law obligations may also violate rights in the Bill of Rights, and thus this would provide an additional and separate basis for finding that such conduct was unconstitutional. But the mere concurrence of separate bases of unconstitutionality in any particular case does not suggest that they are not self-standing grounds of unconstitutionality and unconstitutionality. Indeed, the Court held that its finding that the President’s participation in the suspension of the Tribunal and attempt to amend the Tribunal’s jurisdiction through the Protocol was ‘unlawful’ and

\textsuperscript{138} \textit{SADC Tribunal} (note 3 above) at para 83, where the Court held that ‘Our President’s signature on the Protocol that required a lesser majority support to take away the right of access to justice [then that provided for in the Treaty] flouts the principle of legality which is an incident of the rule of law – one of the foundational values of our democracy.’ In para 49, the Court also emphasised that the unlawfulness of the President’s conduct, which required it to be declared unlawful and unconstitutional, was, inter alia, sourced in the failure to comply with the terms of the Treaty: ‘Whatever the President does must accord with the Constitution and the law. The Protocol that operationalised the Tribunal is an integral part of the Treaty. The jurisdiction of the Tribunal may therefore only be lawfully tampered with in terms of the provisions of the Treaty that regulate its amendment. And it cannot properly be amended in terms of a protocol. It may only be amended by three-quarters of the SADC Member States. The Summit, however, sought to amend the Treaty through a protocol, thus evading compliance with the Treaty’s more rigorous threshold of three-quarters of all its Member States. The protocol route would have been an easy way out in that it only requires the support of ten Member States to pass. But, it is not a legally acceptable procedure for stripping the Tribunal of the most important aspect of its jurisdiction.’

\textsuperscript{139} Even the minority concurring judgment which is cautious to emphasise that it was preferable to make clear that the unlawfulness flowed from a violation of the Constitution, not because the President himself violated international treaty obligations (and therefore relied on ss 7 and 8 of the Constitution as the basis for the unlawfulness), nevertheless, held that ‘the Constitution enswathes the President with the obligation to ensure that his conduct does not result in a breach of South Africa’s international obligations.’ (\textit{SADC Tribunal} (note 3 above) para 100). Thus, while the minority and majority might have some differences as to the constitutional basis for the obligation not to act in ways that breach South Africa’s international law obligations, they both agree that it is a constitutional obligation, and the executive’s conduct would be constitutionally invalid if the obligation is breached. The minority also emphasises in conclusion that it seeks only to avoid the suggestion that the President should himself be viewed as the violator of the international obligations rather than the State, on whose behalf he acts. It accepts, albeit with some differences of semantics and legal reasoning, the same conclusion as the majority: the conduct of the President was unconstitutional because it led to a violation of South Africa’s treaty obligations. Thus the minority held that ‘[t]his approach also spares us the need to engage in the debate on the President’s individual capacity in the realm of the law of treaties. But what remains clear is that the President’s conduct, resulting as it did in a breach by South Africa of its obligations under an international treaty as a State, was impermissible under the Constitution, as irrational and unlawful.’ (\textit{SADC Tribunal} (note 3 above) para 105)
‘irrational’ since it violated the SADC Treaty was ‘one more ground for the invalidation and setting aside of the President’.140

IV AVOIDING PITFALLS IN THE USE OF INTERNATIONAL LAW

The integrative approach to international law that our Constitution requires means that we are now, by constitutional direction, all international lawyers. However, as lawyers and courts that primarily deal with and understand ‘law’ within a domestic law paradigm, it is essential to appropriately appreciate the subtle, yet material, ways that international law, and its interpretation and identification, differ from domestic law. This requires paying attention to certain important principles, and being rigorous and consistent when applying the constitutional injunctions discussed above.

A The dangers to avoid when interpreting and applying international law

In general, there are at least two broad, and interrelated, dangers that one must seek to avoid, in order to adroitly incorporate international law into our law as envisaged by the Constitution. First there is the danger of *jurisprudential cherry-picking*. That is the danger of selecting, on a piece-meal basis, only those international law principles that support the case the court or a practitioner wishes to make, rather than taking account, on a holistic basis, of all the relevant international law, and setting any specific principles that appear, at first, favourable to the approach that one wishes to take, within its broader international law context. The second danger is failing to appreciate the subtle manner that international law operates in distinctly different ways to domestic law. Thus, for instance, a domestic lawyer might erroneously approach an international agreement on the basis that it should be understood and interpreted as something akin to a piece of domestic legislation, when in reality within the often consensual setting of international law, it may be more akin (broadly) to a private agreement between equal parties.

B The SADC Tribunal decision’s illustration of these dangers

The *SADC Tribunal* decision provides an illustration of how these twin dangers may arise, and the difficulties they may cause.141 In the *SADC Tribunal* decision, the Constitutional Court held that President Zuma’s signature of the 2014 Tribunal Protocol had been procedurally irrational and unlawful. The Court held that this was so since seeking to use the 2014 Protocol to replace the 2000 Protocol (the 2014 Protocol provided that once it entered into force it would replace the 2000 Protocol), the Summit had adopted an incorrect procedure that violated the Treaty and purported to exercise powers it did not have. The reason the Court held that the procedure used by the Summit was incorrect, is that art 16 of the SADC Treaty provided that the Protocol adopted by the Summit that governed the Tribunal’s jurisdiction was an integral part of the SADC Treaty (as discussed above, at the time that art 16 was amended to provide for this integration, the Protocol that had been adopted by the Summit, but not ratified, was the 2000 Protocol). Therefore, the Court reasoned that since the SADC Treaty had specific provisions that provided for the amendment of the Treaty, these had to

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140 *SADC Tribunal* (note 3 above) at para 71.

141 Certain of the analysis below is a recast and updated version of some of the arguments that we initially raised in footnotes in Coutsoudis & du Plessis (note 2 above).
be used to amend the 2000 Protocol, rather than adopting an entirely new protocol to replace the previous Protocol. However, when reaching this conclusion, the Court simply made this finding as if there could be no question or debate as to how the Treaty should be interpreted in this respect. Yet, art 16, as amended by the Summit, which made the Protocol in respect of the Tribunal an integral part of the Treaty, included no express provisions as to whether a new Protocol in respect of the Tribunal could be adopted to replace the original or whether because the original Tribunal Protocol had become an integral part of the Treaty, by virtue of art 16, this meant that the Protocol could only be amended by the amendment provisions in the Treaty. And, as the Court knows, in all areas of interpretation, whether of contracts, or domestic statutes or international treaties, one does not simply look at the text, but rather one applies the applicable rules of interpretation to determine the meaning.142 This was certainly required in respect of the SADC Treaty in relation to the process for amending the 2000 Protocol, particularly since no other domestic or international courts had pronounced on the question (and indeed, the Court did not refer to any academic writing considering the proper interpretation of the Treaty). However, the Constitutional Court failed to even reference (nor does it appear to have had regard to or applied) the trite principles for interpreting treaties, as codified in art 31 of the Vienna Convention, or any other relevant principles of international law in relation to the replacement of treaties.143 Although, South Africa is not a party to the Vienna Convention, art 31 of the Vienna Convention, which deals with interpretation of treaties, forms part of customary international law,144 which the Court itself took note of,145 and therefore forms part of our law.146

Article 31 of the Vienna Convention provides inter alia that treaties must be interpreted using a textual and purposive approach. Article 31(3)(b) also provides that ‘[t]here shall be taken

142 For example, see Natal Joint Municipal Pension Fund v Endumeni Municipality [2012] ZASCA 13, 2012 (4) SA 593 (SCA) at para 18; Cool Ideas (note 74 above) at para 28.

143 For instance, given that the 2014 Protocol was adopted by consensus by the members of Summit, representing all the member states of SADC, it was for instance, relevant that international law has no difficulty per say with all the parties to one treaty agreeing to terminate that treaty and replace that treaty with another later treaty, if that is what the later treaty expressly provides. Thus, art 59(1) of the Vienna Convention specifically provides that: ‘A treaty shall be considered as terminated if all the parties to it conclude a later treaty relating to the same subject matter and: (a) it appears from the later treaty or is otherwise established that the parties intended that the matter should be governed by that treaty; or (b) the provisions of the later treaty are so far incompatible with those of the earlier one that the two treaties are not capable of being applied at the same time. 2. The earlier treaty shall be considered as only suspended in operation if it appears from the later treaty or is otherwise established that such was the intention of the parties.’

144 As Shaw International Law (8th ed, 2017) 707 points out the International Court of Justice has affirmed on a number of occasions that art 31 of the Vienna Convention reflect customary international law. See e.g. Namibia (Advisory Opinion) 1971 ICJ Rep 16, para 22.

145 Similarly, in SADC Tribunal (note 3 above) held, at para 38, that ‘Professor Greenwood’s authoritative article, which was published by the United Nations, and the ICJ decisions also confirm that the major provisions of the Vienna Convention like articles on interpretation doctrines and the good faith doctrine amount to a codification of customary international law.’

146 As the Court held in SADC Tribunal (note 3 above) at para 36, ‘although South Africa is not party to the Vienna Convention, it is bound by some of its major provisions like articles 18 and 26. That is so for two reasons. One, an official pronouncement that the Vienna Convention is accepted by South Africa as customary international law has been posted on Parliament’s website and that of the Office of the Chief State Law Advisor. And that, as indicated, is universally recognised evidence of a State’s acceptance of international custom and its binding effect on it. In line with trite international law practice, the binding effect of the Vienna Convention is limited to its main provisions that are by now known to be part of customary international law.’
into account ... any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation’. This principle is, we know, appreciated by the Constitutional Court. In Glenister the Court held that, ‘[i]n terms of art 31(3)(b) of the Vienna Convention ... the subsequent practice of states in applying a treaty can be used to indicate how the states have interpreted the treaty and thus give content to treaty obligations.’

Yet, in the SADC Tribunal decision, it does not appear that the Constitutional Court considered or applied these principles. It simply assumed on its reading of the Treaty that the wrong procedure was used, notwithstanding that the process was approved by the Summit. There was no evidence that any state objected to the procedure being used, and the procedure was adopted by consensus decision of Summit, which meant that all member states, represented in the Summit by their heads of state, agreed to the procedure, with no state formally objecting to this procedure.

Moreover, the procedure adopted was in fact agreed to some two years prior to the adoption of the 2014 Protocol (as the Constitutional Court itself had taken account of in Fick) when the Summit had, in 2012, made a decision to adopt a new protocol to limit the jurisdiction of the Tribunal. Therefore, when the Court was considering whether, given the specific provision in the SADC Treaty for the amendment of the Treaty, the 2000 Protocol could be replaced by the adoption of a new Protocol, the practice of the SADC member states in applying the Treaty was therefore particularly relevant. In addition, within the context of international treaty making, subsequent practice can go beyond acting as a mere guide to interpretation. As Dörr and Schmalenbach in their commentary on the Vienna Convention stress, ‘[s]ince the parties, acting collectively through their concordant practice, are the masters of their treaty, they cannot only take interpretation further than could a body charged with the role of independent interpretation, but also bring about an implicit treaty amendment by practice.’

Similarly, Aust in his work on the law of treaties gives an example of this in practice, pointing out that:

> [d]espite an amendment procedure having been built into it, the CITES Convention 1973 (International Trade in Endangered Species) was effectively modified by a resolution of the Conference of the Parties in 1986. Subsequent practice in the application of a treaty by one or more parties can also have the effect of modifying it if there is tacit or implied consent to it by the other party or parties. This is possible only if it, or they, had the possibility of raising objections to a regular course of conduct, but did not. International law does not have a principle of act contraire.

A decision by the ICJ provides another example of this, in a context that is somewhat closer to home. In Namibia (Advisory Opinion) the ICJ was required to consider a decision-making process that was adopted by an international organisation which was argued not to be in accordance with the procedural rules laid down by the relevant treaty — a situation not

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147 Glenister (note 1 above) (majority judgment) footnote 43, referring to Article 31(3)(b) which provides that ‘[t]here shall be taken into account ... any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation’.

148 Consensus is generally understood to be mean the taking of a decision in the absence any formal objection. For instance, in art 167(7)(e) of the UN Convention on the Law of the Sea, 1982, consensus is defined as ‘the absence of any formal objection.’ For a discuss of the meaning of consensus decision making in international law, see also Aust (note 90 above) at 80–82.


150 Aust (note 90 above) at 233.

151 Namibia (Advisory Opinion) 1971 ICJ Rep 16.
dissimilar to the one facing the Constitutional Court in the *SADC Tribunal* matter. The well-known matter required the ICJ to determine the legal consequences of the continued presence of South Africa in Namibia, which remained in Namibia notwithstanding UN Security Council resolution 276 (1970) (which resolution declared the continued presence of South Africa in Namibia to be illegal and called upon states to act accordingly). In terms of a further resolution (Resolution 284), the Security Council requested the ICJ to provide an Advisory Opinion. South Africa objected to the ICJ dealing with the matter on the basis that Resolution 284 was invalid. South Africa argued that in the voting on the resolution two permanent members of the Security Council abstained, and therefore the resolution was not passed in compliance with the express terms and requirements in Article 27(3) of the Charter of the United Nations, which requires all resolutions to be passed with ‘the concurring votes of the permanent members’. The ICJ dismissed South Africa’s objection relying on the subsequent practice of the Security Council and the acceptance thereof by the members of the United Nations. In particular, the Court held, that:

> the proceedings of the Security Council extending over a long period supply abundant evidence that presidential rulings and the positions taken by members of the Council, in particular its permanent members, have consistently and uniformly interpreted the practice of voluntary abstention by a permanent member as not constituting a bar to the adoption of resolutions. By abstaining, a member does not signify its objection to the approval of what is being proposed; in order to prevent the adoption of a resolution requiring unanimity of the permanent members, a permanent member has only to cast a negative vote. This procedure followed by the Security Council, which has continued unchanged after the amendment in 1965 of art 27 of the Charter, has been generally accepted by Members of the United Nations and evidences a general practice of that Organization.

As Aust opined, ‘[t]he practice was upheld by the International Court of Justice in Namibia (South West Africa) (Legal Consequences for States of the Continued Presence of South Africa), even though, ironically, it is clear from the travaux of the Charter that it was not what had been originally intended by the members most directly affected: the permanent members.’

The Court’s apparent failure to have due regard to the practice of SADC member states in determining whether the procedure adopted violated the Treaty, may have been compounded by a certain inadequacy in the Court’s consideration of the nuances in the provisions of the Treaty relating to the amendment of the Treaty and those that deal with the entering into of new Protocols. In essence the Court held that the Summit should not have sought to amend the 2000 Protocol by way of the adoption and opening for signature and ratification of a new Tribunal Protocol that would replace the previous Tribunal Protocol, because the process used was a less onerous procedure than the Treaty amendment procedure. The general procedure for new Protocols to be adopted and come into force (in terms of art 22) and the procedure for amending the Treaty (in art 36) are, indeed, substantially different. But which is more onerous than the other, is somewhat more complicated. Under art 22 of the SADC

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152 Namibia (Advisory Opinion) ibid at paras 20, 21.
153 Namibia (Advisory Opinion) ibid at para 22.
154 Aust (note 90 above) at 215, emphasis added.
155 The Court initially took account of the fact that it is the Summit’s members (albeit on behalf of their states) who have the power to amend the Treaty (*SADC Tribunal* (note 3 above) at para 55) but it appears not to consider the importance of this distinction when comparing the rigours of the two procedures.
156 *SADC Tribunal* (note 3 above) at para 55.
Treaty, protocols must be adopted by the Summit. The article then requires signature and ratification by two-thirds of the Member States in order for the protocols to enter into force and be binding on those Member States. On the other hand, art 36 of the Treaty provides that amendments to the Treaty require only that three-quarters of the *members of the Summit* (that is the heads of state) to vote in favour of the amendments. In suggesting that the amendment procedure was more stringent, the Constitutional Court focused on the different percentages required (two-thirds vs three-quarters) without considering, or failing to reflect properly on, the important difference between the decision-makers. For a new Protocol to come into force, two-thirds of the member states must take the decision to enter into the new Protocol, by ratification, which would invariably require domestic parliamentary approval. For Treaty amendments it is three-quarters of the heads of state, as members of the Summit, must vote in favour of the amendment. Moreover, in terms of art 22, before a Protocol can be opened for signature and ratification, it must first be adopted by consensus of the Summit.\footnote{SADC Treaty, art 22(2) read with art 10(9).} Article 22 therefore appears to suggest that a protocol may not be adopted (a necessary precursor to the treaty than being open for signature and ratification by member states) in circumstances where there is a formal objection from any member of Summit to the adoption. Had the Treaty (incorporating the 2000 Tribunal Protocol) been amended using art 36, as the Court seems to suggest was the appropriate process, all that would have been required was a vote by 12 of the 15 heads of state (three-quarters of the members of the Summit). Therefore, had the Summit used art 36 permanently to change the jurisdiction of the Tribunal, even if the South African President, as a member of Summit, had voted against such amendment, he could have been outvoted. Moreover, SADC’s past practice, as well known to the Court, reveals that requiring ratification of a Protocol, appears to be, in practice, more onerous than using the amendment procedure. This is made clear by the history of the entry into force of the 2000 Protocol, which created the Tribunal’s jurisdiction to hear individual complaints. As we discussed above, the 2000 Protocol only entered into force by virtue of a Summit amendment of the Treaty, used as an expedient to bring the Protocol into force because the requisite ratifications of the Protocol (10 of the 15 member states) had not been received (possibly because states and their Parliament may have been anxious, on reflection, of agreeing to give an international tribunal jurisdiction over them to hear complaints from individuals). The Court took account of precisely this fact in *Fick*, where it noted that:

> The coming into effect of the Tribunal Protocol depended on its ratification by two-thirds of the Member States. It appears that the requisite number of ratifications was not obtained. As a result, the Tribunal Protocol did not come into operation. This hurdle was overcome through the amendment of the Treaty by the SADC supreme policy-making body known as the Summit, which comprises the Heads of State or Government of SADC Member States. It has the power to amend the Treaty. And such amendment becomes operative only after adoption by the prescribed three-quarters of all Members of the Summit. The amendment alluded to above was effected by the Summit in terms of the Agreement Amending the Treaty of the Southern African Development Community (Amending Agreement). Article 16(2) of the Treaty was amended to provide for the Tribunal Protocol to be an integral part of the Treaty, obviously subject to the adoption of the Amending Agreement. This was notwithstanding the provisions of article 38 of the Tribunal Protocol which required ratification of the Tribunal Protocol by two-thirds majority before it could come into operation. This amendment, therefore, removed the ratification requirement.\footnote{Fick (note 36 above) at paras 9–10.}
In this context, it is also interesting to note that in the SADC Tribunal matter, the Constitutional Court did, in a portion of the decision that is obiter, raise concerns about the jurisdiction conferred on the Tribunal by the current 2000 Protocol (brought into force by the Summit’s amendment of the Treaty). The Court held that art 15 of the Protocol —

seems to imply that disputes relating to issues provided for by both the Treaty and national constitutions are ‘appealable’ or justiciable before the Tribunal even after the highest court of any SADC country has finally disposed of the matter. The precondition for a natural or legal person to have access to the Tribunal only after he or she has ‘exhausted all available remedies ... under domestic jurisdiction’ seems to allude to that possibility. And that might mean that the Tribunal could even set aside the decisions of apex courts.159

The Court, therefore, noted that:

[i]t may well be that the Executive and Legislature need to reflect on whether there is a need to do anything at all about these apparently conflicting positions. And it really cannot do any harm but could do a lot of good to our constitutional democracy and good governance to alert them to the possible conflict in case they are not alive to it.160

Now leaving aside the question of how art 15 ought to be interpreted and whether it is ever appropriate to refer to an international court ‘setting aside’ the decision of a domestic court, the key point for current purposes is that because the 2000 Protocol was not ratified using the normal procedure for bringing Protocols into force (in terms of art 22 of the Treaty) but came into force by virtue of the Summit amending the Treaty, the 2000 Protocol was never tabled before Parliament for approval so that it could be ratified. Thus, the South African legislature never had an opportunity to consider and approve art 15 or any of the other articles of the 2000 Protocol. Whatever specific jurisdiction the Tribunal has over South Africa as provided in the 2000 Protocol, the Tribunal has absent parliamentary approval. Rather, the head of state of South Africa, as a member of Summit, brought the Protocol into force by voting in favour of the amendment of Treaty (as the Court discussed in Fick). It is precisely for this reason that the amendment power given to the Summit in art 36 of the Treaty, while evidently perfectly permissible from an international law perspective, raises serious questions from a domestic constitutional perspective. In essence, art 36 appears to allow for an amendment to a treaty that is binding on South Africa to occur without prior parliamentary approval (since the amendment is not by way of new international agreement, which must be ratified with parliamentary approval, but by way of a vote of the heads of state as members). Moreover, the vote to amend need not be unanimous. Thus, even if South Africa’s President voted against an amendment, the amendment could still pass if approved by three-quarters of the other heads of state. Yet, in the SADC Tribunal matter, the Constitutional Court did not raise any constitutional difficulties with the amendment power given to the Summit, and in fact, based its decision in the SADC Tribunal matter on the submission that President Zuma was constitutionally obligated to make use of the amendment power together with other members of the Summit, if there was a desire to change the Tribunal’s jurisdiction, even though this would apparently have excluded parliamentary involvement.

All of this is not to say that the Court was incorrect in finding that the procedure used by the Summit to replace the 2000 Protocol with a new Protocol that would, if ratified, have changed the Tribunal’s jurisdiction, violated the Treaty. Rather, our point is that before

159 SADC Tribunal (note 3 above) at para 59.
160 Ibid. at para 60.
reaching such a conclusion, there were significant international law principles and issues that warranted careful consideration, but appear to have been glossed over or looked at fleetingly.

C Some practical suggestions on avoiding the dangers

There are a number of ways that the Court may seek to avoid the pitfalls that sometimes arise in relation to engaging with international law. We merely make two suggestions.

First, the Court may expressly seek to call for international law experts to provide independent, expert submissions on the relevant international law issues facing the Court, as amici curiae in matters. This is precisely the approach that the Constitutional Court itself adopted in Okah. In that case the Court was confronted with a submission by Mr Okah that his prosecution was precluded by s 1(4) to the Terrorist Act. 161 This section excludes certain acts committed during a struggle by the people ‘in the exercise or furtherance of a legitimate right to national liberation, self-determination and independence against colonialism, or occupation or aggression or domination by alien or foreign forces, in accordance with the principles of international law’) from being determined to be terrorist activities. Albeit less than two weeks before the hearing, the Court issued directions drawing the relevant legal submissions (Mr Okah and the State’s response) to the attention of certain organisations and persons with expertise in international law. Given the short time available, in response to these directions, only two organisations brought urgent applications to be admitted as amici and subsequently made written and oral submissions on the international law issues confronting the Court. The Court’s attempt to obtain the opinions of experts in international law is a commendable approach and there is obviously value in the Court adopting this as a regular practice when cases before it turn primarily on international law issues. Moreover, it is an approach that not only the Constitutional Court, but the high court too may seek to emulate. No doubt, the academy and other international law institutions would be ready and willing to assist our courts in interpreting and applying international law within the South Africa context. What would be helpful then from either the Constitutional Court or any other court, would be to recognise as early as possible in the process that international law expertise will be required. Once that assessment has been made, it would then be helpful to provide timeous notice when issuing any directions, so that a full range of international law organisations might be encouraged and able to assist the Court.

Second, while there are many excellent writings on international law, there is much value in the Court ensuring that it gives sufficient attention to any relevant work by the ILC that deals with issues before it. The ILC is the UN’s specialised expert body tasked with the progressive development of international law and its codification. 162 The ILC’s many and varied

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161 Section 1(4) provides that: ‘Notwithstanding any provisions of this Act or any other law, any act committed during a struggle waged by peoples including any action during an armed struggle, in the exercise or furtherance of their legitimate right to national liberation, self-determination and independence against colonialism, or occupation or aggression or domination by alien or foreign forces, in accordance with the principles of international law, especially international humanitarian law, including the purposes and principles of the Charter of the United Nations and the Declaration on the Principles of International Law concerning Friendly Relations and Cooperation among States in accordance with the said Charter, shall not, for any reason, including for the purposes of prosecution or extradition, be considered as terrorist activity as defined in subsection.’

162 For example, art 1(1) of the Statute of the International Law Commission (1947) provides that, ‘[t]he International Law Commission shall have for its object the promotion of the progressive development of international law and its codification’. 
programmes of work that deal with broad swathes of international law, and which consider, explain, synthesise and codify that law, may often be of particular assistance to a domestic court seeking clear and authoritative guidance on contested issues of international law. For instance, in the *Grace Mugabe* case, where the court was required to settle the arguments as to whether customary international law recognised immunity for the spouses of heads of state, the court had comforting and detailed regard to the work of the ILC and its special rapporteur in relation to immunity from foreign criminal jurisdiction. This played an important role in assisting the court to find that the Minister’s submissions as to the position of such spouse in international law were incorrect.

V CONCLUSION

Over the last decade, our courts have heeded the Constitutional Court’s clarion call to take seriously the inescapable constitutional injunction to integrate, in ways envisaged by the Constitution, international law obligations into our domestic law. The Constitution’s international law trifecta has now begun to be entrenched in our courts’ jurisprudence. The Constitutional Court has it made clear that public officials are, absent a conflict with the Constitution, required by the Constitution to act in accordance with international law binding on South Africa, including international law which prescribes the procedures to be followed by an international organisation to which South Africa is a party. If they fail to do so, their actions, including on the international plane, can be reviewed and set aside by domestic courts. And while there are many issues that have, of course, not been fully, or satisfactorily, resolved, we have little doubt that in subsequent cases, the courts will continue to fully and progressively ensure that international law is properly integrated in our domestic law, and that officials are held to account where their actions are in conflict with South Africa’s international law obligations. Obviously, in view of the power and responsibility given to South Africa courts by the Constitution’s integrative injunction, and the features of its international trifecta, as courts which can and are indeed required to interpret and apply international law directly, they should do so in a manner that best integrates international law into our domestic realm.
International Law, Access to Courts and Non-Retrogression: *Law Society v President of the Republic of South Africa*

SANYA SAMTANI

**ABSTRACT:** In 2014, the President of the Republic of South Africa signed a Protocol to the SADC Tribunal aimed at stripping the Tribunal of its jurisdiction to hear matters brought by individuals. This followed the President’s 2010 decision not to reappoint judges to the SADC Tribunal, rendering it inoperative. In *Law Society v President of the Republic of South Africa*, the Constitutional Court considered an application for confirmation of the High Court’s order declaring these two acts unconstitutional. The Court held that the President’s conduct was irrational, unlawful and unconstitutional on three grounds. I focus particularly on the ground that the President’s conduct violated or threatened to violate the Bill of Rights.

The right of access to justice is guaranteed through the right of access to courts under s 34 and the right to the enforcement of the Bill of Rights under s 38 of the Constitution. In *Law Society*, the Court interpreted s 34 expansively, extending the *domestic* right of access to courts to *international* tribunals. The Court held that the Bill of Rights guarantees the right to access the SADC Tribunal (subject to the Tribunal’s jurisdictional pre-requisites). The President was held to have breached his s 7(2) duty to respect, protect, promote and fulfil the right. The reasoning is sparse, leaving several unanswered questions.

While agreeing with the overall outcome, I argue that the Court should have properly applied the constitutional scheme detailing the relationship between international and domestic law. The Court could have justified the outcome in one of two ways: either through a finding that the relevant provisions of the SADC Treaty and Protocol were self-executing (*directly* applicable) under s 231(4); or by applying international law indirectly in terms of s 39(1)(b) of the Constitution when interpreting the right in s 34. It did neither, seemingly applying international law *directly* but without explaining the basis for its approach. Further, in applying the principle of non-retrogression without clarifying its scope, content and limits, the Court missed an opportunity to illustrate to which *international* courts the right of access to courts applies and when (if ever) the state may take away existing access to an international court aimed at protecting human rights. The Court’s approach creates a risk of rendering the constitutional scheme redundant in service of outcome-oriented application of international law.

**KEYWORDS:** access to courts, non-retrogression, public international law, relationship between international and domestic law, self-executing treaties
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I INTRODUCTION

In 2014, the President of the Republic of South Africa signed a Protocol aimed at stripping the South African Development Community (SADC) Tribunal of its jurisdiction to hear matters brought by individuals. This matter, along with the President’s 2010 support for a decision not to reappoint judges to the SADC Tribunal rendering it inoperative,1 was heard at the Constitutional Court in *Law Society v President of the Republic of South Africa* in August 2018.2 The relief sought was confirmation of the North Gauteng High Court’s order of constitutional invalidity.3 The Court held that the President’s conduct was irrational, unlawful and unconstitutional on three grounds. In this article, I analyse the ground that the President’s conduct violated or threatened to violate the Bill of Rights, specifically the right of ‘access to justice’, and was therefore unconstitutional. I focus solely on this ground.

The right of access to justice is guaranteed through the right of access to courts under s 34 and the right to the enforcement of the Bill of Rights under s 38 of the Constitution. The right of access to courts ensures that rights-bearers have an effective remedy through the formal systems of justice. In *Law Society*, the Court adopted an expansive interpretation of s 34 to extend South Africans’ right of access to domestic courts, to international tribunals as well. The Court held that South Africans have a right guaranteed by the Bill of Rights to access the SADC Tribunal. The President, in stripping the Tribunal of its individual jurisdiction and effectively suspending its operations, breached his duty to respect, protect, promote and fulfil the right under s 7(2). The reasoning behind this conclusion, however, is sparse. This leaves several unanswered questions and concerns about the implications of the judgment and about the proper interpretation of the relationship between international law and domestic law by the Court.

In Part II of this article I provide a brief summary of the facts and holding in the case. In the rest of the article, whilst agreeing with the outcome, I point to the gaps in the Court’s reasoning. I highlight how the Constitution of the Republic of South Africa, 1996 (the Constitution) offers a framework for these gaps to be filled, and I briefly trace the various reasons that may have been employed by the Court in justifying its decision. In doing so, I split my analysis into three parts: first, in Part III, I locate the Court’s holding in relation to the twin rights of access to justice, on which the Court relied, in the Constitution and in the SADC Treaty. I map the relevant passages in the majority judgment to outline what exactly the Court meant when it referred to the ‘right of access to justice’ in the Constitution (which I locate principally in s 34) and in the SADC Treaty (and its attendant 2000 Protocol, which contains the provision at issue). Then, in Part IV, I analyse s 34 and its extended application to the international plane. Until *Law Society*, s 34 had been interpreted as access to domestic South African courts rather than international courts. The decision in *Law Society* significantly expands the interpretation of s 34. It extends s 34 to include an individual right of access to those international tribunals to which South Africa has acceded. I point out how the Court’s holding is an assertion rather than a reasoned conclusion, despite the existence of tenable lines of argument in the oral and written argument before it.

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1 This is explained in Part II of the article.
3 *Law Society of South Africa & Others v President of the Republic of South Africa & Others* [2018] ZAGPPHC 4; [2018] 2 All SA 806 (GP) (‘Law Society HC’).
Third, in Part V, I analyse the finding that there is a directly applicable ‘Treaty right’ emerging from the SADC Treaty and its attendant 2000 Protocol. The majority judgment suggests that this ‘Treaty right’ could conceivably arise in two ways: first, as a free-standing application of a provision of an international treaty under s 231 of the Constitution, and second, as the application of international law as an interpretive guide under s 39(1)(b) of the Constitution for the proper interpretation of the right in s 34. In relation to the first, I explain that the Court assumes the direct applicability of art 15 of the 2000 Protocol read with the SADC Treaty. The proper application of s 231 would entail a careful analysis of the applicable sub-section (whether it is s 231(2) or s 231(4)) in order to determine the nature of the obligations that these instruments impose on the state. In relation to the second, I argue that the Court errs in omitting to apply s 39(1)(b) to use international law in interpreting the Bill of Rights, instead resting on the assumption that international law applies directly. I then provide an overview of possible ways of carrying out these two forms of analysis, explaining what the Court should have done.

Further, in Part VI, I go on to analyse the corresponding duty arising from a proper interpretation of s 34 and the contours of this duty. I argue that although Law Society does not explicitly invoke the principle of non-retrogression, the Court applied the principle in a novel way to hold the President accountable under s 7(2). I explore the extent and limits of this holding, and explain that it is arguably in line with existing constitutional commitments. Finally, in Part VII, I discuss the implications of the Law Society majority judgment: for international dispute resolution mechanisms created by ratified treaties; the relationship between international and domestic law in South Africa; and access to justice. I conclude by analysing how Law Society may be read as strengthening South Africa’s international commitment to the enforcement of human rights law within and outside of the country.

II LAW SOCIETY: FACTS AND HOLDING

Law Society came before the Constitutional Court as an application for confirmation of an order of constitutional invalidity handed down by the North Gauteng High Court in March 2018. The High Court had declared two acts of the President to be unlawful, irrational, and thus unconstitutional. The impugned acts were the President’s involvement in the suspension of the SADC Tribunal in 2011 and in removing the Tribunal’s individual jurisdiction. The first impugned act — the suspension — consisted of the President’s participation in decisions not to reappoint Tribunal members whose terms expired in August 2010, as well as those whose terms expired in October 2011, effectively suspending the Tribunal’s operations. The second impugned act consisted of the President’s signature of the 2014 Protocol removing the individual jurisdiction of the SADC Tribunal, thus limiting member states’ access to the Tribunal to resolving inter-state disputes.

In order to map the context in which the Constitutional Court interpreted the right of access to courts more fully, I set out here the legal architecture of the Tribunal. The Southern African Development Community (SADC), of which South Africa is a member, came into existence through a Treaty in 1992 aiming to ensure, amongst other things, the ‘guarantee of

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4 Law Society (note 2 above) at paras 18 and 97.
5 Law Society HC (note 3 above) at paras 67 and 72.
6 Ibid at para 26.
7 Ibid at para 11.
democratic rights, observance of human rights, and rule of law’. South Africa acceded to the SADC Treaty in 1994, and the accession was approved by the Senate and National Assembly in 1995. This is akin to the procedure provided for in s 231(2) of the Constitution. I will return to this point later.

Article 16 of the SADC Treaty, as amended in 2001, provides for the establishment of a Tribunal, with an attendant Protocol that describes its composition and functioning. It also mandates member states to appoint members (judges) to the Tribunal. Vitally, the Treaty provides for the Tribunal itself to be the forum in which disputes about the interpretation or application of the Treaty and the Protocols concluded in connection with the Treaty are to be settled. The Protocol on the Tribunal in the SADC (2000 Protocol), adopted in 2000, established the jurisdiction of the Tribunal. Article 14 of the 2000 Protocol provides that the jurisdiction of the Tribunal extends to disputes and applications that are referred to it that relate to the interpretation and application of the SADC Treaty, its attendant Protocols, subsidiary agreements concluded within the SADC framework and its institutions, as well as all other instruments concluded between member states or within the SADC framework that explicitly provide for the Tribunal to have jurisdiction. The scope of the Tribunal’s jurisdiction is laid out in Article 15. It provides that ‘the Tribunal shall have jurisdiction over disputes between [Member] States, and between natural or legal persons and [Member] States’. This is followed by a qualification for disputes brought by natural and legal persons — that domestic remedies should have been exhausted or that such persons are unable to proceed under their domestic jurisdiction. The Tribunal was thus available as a forum for individual complaints (provided that the other two conditions had been fulfilled).

The Constitutional Court, through Fick, had a role to play in the events leading up to Law Society. The purpose for the creation of the SADC Tribunal was to ensure that individuals and states had recourse to a dispute resolution forum in the event that a SADC state acted to undermine the agenda of development through ‘human rights, rule of law and democracy’. The dispute before the SADC Tribunal in Fick was brought by Zimbabwean farmers who challenged the expropriation of their farms without compensation by the Zimbabwean government, as well as Zimbabwe’s land reform policy that included ouster clauses to prevent their access to domestic courts. The Tribunal decided against the Government of Zimbabwe and held that Zimbabwe’s acts violated the SADC Treaty. Moreover, the Tribunal ordered Zimbabwe to take all necessary measures to prevent the dispossession of the farmers as well as to pay compensation to the complainants. However, the state refused to comply with the decision. The Tribunal then, as per the procedure prescribed in the SADC Treaty and 2000 Protocol, referred the matter to the SADC Summit along with a costs order. The Zimbabwean government failed to comply with the Summit’s decision in this regard. The Zimbabwean

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9 Ibid (Fick) at para 30.
10 SADC Treaty (note 8 above) art 14.
11 Ibid at art 15(1).
12 Law Society HC (note 3 above) at para 19.
13 Fick (note 8 above) at para 2.
farmers then approached the North Gauteng High Court in South Africa for the execution of Zimbabwean property in South Africa as fulfilment of the costs order. The Government of Zimbabwe moved the North Gauteng High Court to suspend the execution of the costs order as well as rescind its registration and service. The High Court dismissed these claims. The Government of Zimbabwe appealed to the Supreme Court of Appeal and once again, the Zimbabwean farmers were successful. The Government of Zimbabwe further appealed this decision in the Constitutional Court of South Africa in Fick, which upheld the decision of the High Court and dismissed Zimbabwe’s appeal with costs. The events that followed took place in the aftermath of this litigation. They constitute the two impugned acts that were the focal points of the Law Society case.

A The first impugned act: Suspension of the SADC Tribunal

In 2010, in a meeting of Heads of State in Windhoek, Namibia, the issue of Zimbabwe’s lack of compliance with decisions of the SADC Tribunal was raised. At this meeting, the SADC Summit took a decision not to reappoint the members of the Tribunal whose terms were due to expire at the end of August 2010. In addition, the Heads of State decided that a committee be set up, comprising of Ministers of Justice and Attorneys General from the region, to review the ‘role and responsibilities’ of the Tribunal. Any further decisions were to be taken only after the report was received. At the subsequent meeting of the Heads of State in May 2011, the decision not to reappoint those members whose terms expired in August 2010 was confirmed. It was also decided not to reappoint those members whose terms expired in October 2011. These decisions were taken notwithstanding the report of the SADC countries’ Ministers of Justice and Attorneys General that the SADC Treaty mandated the creation of the Tribunal and its staffing; that the 2000 Protocol had been validly concluded; and that the Tribunal had been properly constituted and its rules of procedure were valid. In essence, the decisions not to reappoint members of the Tribunal violated art 16 of the SADC Treaty. This violation of the SADC Treaty was attributable to South Africa, as a matter of international law, through

16 Government of the Republic of Zimbabwe v Fick and Others [2011] ZAGPPHC 76 (application for leave to appeal against enforcement of costs order).
18 Fick (note 8 above) at para 3–4.
19 Ibid at para 106.
20 Ibid at paras 20–22.
21 Ibid at para 25.
22 Article 2 and Article 4 of the International Law Commission’s Articles of State Responsibility (Draft Articles on Responsibility of States for Internationally Wrongful Acts, in Report of the International Law Commission on the Work of Its Fifty-third Session, UN GAOR, 56th Sess., Supp. No. 10, at 43, UN Doc. A/56/10 (2001), available at http://www.un.org/law/ilc) indicates that in order for a state to be held responsible for internationally wrongful acts, first, there must be a breach of an international obligation incumbent upon that state; and second, that this breach must be attributable to the same state. I have prima facie asserted here that the impugned acts constitute breaches of international obligations incumbent upon South Africa and that these acts are attributable to South Africa. A detailed analysis of South Africa’s international responsibility in this regard is outside the scope of this article.
President Zuma’s attendance and participation: the President attended and participated in the meeting in August 2010, and although he was not present in May 2011, he was represented and a decision taken on his authority.\(^{23}\) The issue that concerned the High Court, and subsequently the Constitutional Court, was whether the President acted in accordance with the South African Constitution in taking these decisions.

**B  The second impugned act: Removal of individual jurisdiction**

In August 2014, a new Protocol on the Tribunal was concluded (2014 Protocol) at a meeting of the Heads of State.\(^{24}\) Article 33 of the 2014 Protocol was amended to provide that the Tribunal shall have jurisdiction over disputes brought by Member States in relation to the interpretation and application of the SADC Treaty and its attendant Protocols. This deleted the part of the provision that previously provided for the Tribunal’s individual jurisdiction. In other words, this amendment removed the possibility of individuals and other non-state actors moving the Tribunal that was previously guaranteed by the 2000 Protocol. The issue that concerned the High Court, and subsequently the Constitutional Court, was whether the President acted in accordance with the Constitution in signing the 2014 Protocol.

**C  The court proceedings in Law Society**

The High Court held that the impugned acts were unlawful, irrational and thus unconstitutional.\(^{25}\) The order was subsequently referred to the Constitutional Court for confirmation. The Constitutional Court, on 11 December 2018, unanimously confirmed the unconstitutionality of the President’s impugned acts. The Court additionally directed the President to withdraw South Africa’s signature from the 2014 Protocol.\(^{26}\) Mogoeng CJ wrote for the majority, with Froneman and Cameron JJ delivering a separate judgment, in which two other Justices concurred. The minority judgment concurred in the order proposed by the majority, but held that the unlawfulness of the President’s acts emerged from his dereliction of constitutional duty under ss 8(1) and 7(2) rather than stemming from a violation of the SADC Treaty.\(^{27}\) In the subsequent section, I unpack the ground that both judgments seem to agree on — that the President’s acts violated s 34, the right of access to courts, in the Bill of Rights.

**III  THE TWIN RIGHTS OF ACCESS TO COURTS**

*Law Society* appears to locate access to courts on two planes: the Bill of Rights, domestically, and the SADC Treaty and 2000 Protocol, internationally. The majority judgment in *Law Society* referred to the right of access to justice a total of 18 times in its 97 paragraphs, and the concurrence referred to the right of access to justice twice in its eight paragraphs. The Court relied directly on the right of access to justice as a substantive cause of action and referred to it as a right emerging from the Bill of Rights and the SADC Treaty.\(^{28}\) The Court did so despite neither instrument containing a right styled ‘access to justice’. As the Court referred to access

\(^{23}\) Fick (note 8 above) at para 26.

\(^{24}\) Ibid at paras 6–7.

\(^{25}\) Ibid at para 72.

\(^{26}\) *Law Society* (note 2 above) at para 97.

\(^{27}\) Ibid at paras 98–105.

\(^{28}\) Ibid at para 29.
to justice as a ‘right’ in both the Constitution and the SADC Treaty, it could not have been employing the term simply as a value or a rhetorical flourish. However, the Court failed to explain or directly situate the right in terms of any source of domestic or international law binding on South Africa. In this section, I locate the right of access to justice, on which the Court relied, in specific provisions of the Constitution and the SADC Treaty.

I deal with the Bill of Rights first. In this section I tease out what the Court may have meant by the ‘right of access to justice’, based on the oral and written submissions made before the Court during the proceedings; the judgment itself; and the text of relevant provisions in the Constitution. All of these considerations indicate that the Court was relying on the right of access to courts in s 34 of the Constitution, possibly in conjunction with s 38. In particular, one of the amici in the case (the Southern African Litigation Centre (SALC)) argued that the right of access to courts in s 34 includes the right of access to the SADC Tribunal, the President’s impugned acts infringed this right, and were not justifiable under s 36 limitations analysis.29

Since the case arrived at the Constitutional Court as an application for the confirmation of a declaration of constitutional invalidity of the President’s conduct in the North Gauteng Division of the High Court (Pretoria), the High Court judgment is also material to locating this right. There are only two references to the right of access to justice in the judgment of the High Court, whilst 13 references are to the right of access to the SADC Tribunal and 5 references are to the right of access to courts. Moreover, the First Applicant before the High Court (the Law Society) contended that the impugned acts of the President violated s 34 of the Constitution — the right of access to courts.30 This argument, in relation to the interpretation of s 34 of the Constitution in an international and regional context, was raised by SALC (as amicus in the case at the High Court as well).

The right of access to justice may be interpreted narrowly or broadly — but on any interpretation includes, as an integral part of the right, access to a court or another formal or informal mechanism with the power to adjudicate upon a dispute.31 In other words, whatever else access to justice may entail, it includes within it the right to take a justiciable dispute to a court or other appropriate forum and have it adjudicated. Reading Law Society in the context of the High Court judgment and the arguments advanced at the High Court and Constitutional Court, it is clear that the Court held this component of access to justice to have been infringed — that is, the right of access to courts (here, the SADC Tribunal). The

29 Southern African Litigation Centre, Written Submissions in Law Society (note 2 above) at paras 19, 20, available at https://www.southernafricalitigationcentre.org/wp-content/uploads/2014/08/SALC-Amicus-HOA.pdf. This argument was advanced by the appellants in the Swissbourgh Diamond Mines and Others v the Kingdom of Lesotho, Permanent Court of Arbitration Case-2013-29, but the award has not been made public. The access to courts argument is referred to by the appellants in Van Zyl and Others v the Government of the Republic of South Africa and Others 2008 (3) SA 294 (SCA) where the Supreme Court of Appeals dismissed the claims of the appellants and held in favour of the respondents. For a detailed account of the right of access to courts argument raised in respect of the Kingdom of Lesotho’s participation in the same conduct and its treatment by the Permanent Court of Arbitration and beyond, see D Tladi, ‘The Constitutional Court’s Judgment in the SADC Tribunal Case: International Law Continues to Befuddle’ 10 Constitutional Court Review, 129

30 Law Society HC (note 3 above) at paras 8, 21.

The Constitution recognise[s] that courts are integral to the enforcement of the guarantees provided for in the Bill of Rights in s 34. I thus locate the right of access to justice, as it appears in the Constitutional Court judgment, primarily in s 34 of the Constitution, read with s 38.

Section 34 is titled ‘access to courts’ and states that ‘[e]veryone has the right to have any dispute that can be resolved by the application of law decided in a fair public hearing before a court, or where appropriate, another independent and impartial tribunal or forum.’ Where a right in the Bill of Rights is engaged, this must be read with the relevant part of s 38, titled ‘enforcement of rights’, which states that ‘[e]veryone listed in this section has the right to approach a competent court, alleging that a right in the Bill of Rights has been infringed or threatened, and the court may grant appropriate relief, including a declaration of rights.’ In this section, I draw from language in the judgment that makes it clear that the Court is indeed referring to s 34 in its reliance on ‘access to justice’.

At the start of the judgment, the first reference to access to justice was to the effect of the impugned acts of the President as having deprived South Africans (and the citizens of other SADC member states) of their access to the SADC Tribunal for the vindication of their human rights. Subsequently, the Court went on to analyse the impact of the 2014 Protocol on the constitutional rights of South Africans. It did so by quoting from *Geuking v President of the Republic of South Africa* to reinforce what is explicit in s 38 — that a threat to a right in the Bill of Rights is substantively sufficient for an individual to have standing before a competent court under s 38 of the Constitution (as long as the person falls within the categories outlined in s 38). This means that there need not be a prospective applicant to the Tribunal whose right of access to courts has been actually violated by the President’s acts in order to bring a constitutional challenge. It is enough for a threat to exist. The Court identified the right in the Bill of Rights that was under threat as the right of access to justice. The threat in this case was identified as the 2014 Protocol, which stripped the Tribunal of its individual jurisdiction. In effect, it no longer allows citizens of SADC member states access to the SADC Tribunal, once it comes into force. Formulated differently, the threat here was to the right of access to the SADC Tribunal which the Court understood to fall within the remit of s 34.

At various points, the Court referred to twin rights of access to justice conferred upon individuals by the SADC Treaty and by the Bill of Rights. This was further explained by the Court to mean that:

> We [South Africa] are about access to justice and access to all appropriate justice-dispensing platforms. [The President] thus lacked the authority to sign any international agreement that seeks to frustrate the pre-existing right of South Africans to access justice, that was secured for them by our supreme law-making body. As long as fundamental rights, like access to justice, that are protected by an international agreement also remain an integral part of our Constitution, the President may not, without a prior and proper amendment to remove those rights, initiate a process that constitutes a threat to them.

This brings me to the second possible location of the right of access to courts — on the international plane. The judgment must be read to have held that, in addition to s 34 of the

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32 *Law Society* (note 2 above) at para 15.
34 *Law Society* (note 2 above) at para 29.
36 Ibid at para 77.
Constitution, there is a twin right of access to justice in the SADC Treaty, and the impugned acts of the President violate this right as well. *Law Society* refers to ‘Treaty rights’ that guarantee access to justice. More concretely, the judgment referred to ‘[t]he individual right of access to the Tribunal [that] was still protected by the Treaty when the President signed the impugned (2014) Protocol.’ A reading of the SADC Treaty indicates that the parties to whom it applies are member states rather than individuals. So what was the judgment referring to when it discussed the ‘Treaty rights’ of individuals to access justice?

A closer look at the SADC Treaty indicates that its Protocols are considered to be ‘instruments of implementation of the Treaty’. The Court, in its reference to ‘Treaty rights’, is alluding to the specific provision in the 2000 Protocol (drafted in fulfilment of Article 16(2) of the SADC Treaty) that details the jurisdiction of the Tribunal. It states that, ‘[t]he Tribunal shall have jurisdiction between States, and between natural or legal persons and States’. The subject-matter jurisdiction of the Tribunal includes the interpretation and application of the SADC Treaty and other instruments and acts relating to the SADC community. The Court focused primarily on the right of individuals to bring disputes relating to human rights, democracy and the rule of law before the Tribunal through its individual jurisdiction.

I will return to this characterisation below when I consider the Court’s use of the principle of non-retrogression. In characterising the 2000 Protocol’s provision on individual jurisdiction as a ‘Treaty right’, the Court also referred to South Africa’s international treaty obligation under the SADC Treaty to create and sustain SADC institutions such as the Tribunal.

The judgment’s assertive finding that the President’s impugned acts infringed s 34 has two implications — first, that s 34 must be interpreted expansively to encompass an individual right of access to international courts such as the SADC Tribunal (the ‘application’ question), and secondly that any unjustifiable state interference that hinders access to the SADC Tribunal infringes the right (the ‘content’ question). I deal with these two questions of application and content in the next section. Second, the majority referred to an additional right of access to courts emanating from the Treaty. In the subsequent section, I explain what the Court did in relation to this issue; what it did not do; and whether, and if all when, it is possible for the SADC Treaty to directly create rights for South African citizens and impose obligations upon the state, under the scheme of s 231 of the Constitution.

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37 Ibid at para 29.
38 Ibid at para 85. The African Commission, in disposing of the same issue in Communication 409/12 — *Luke Munyandu Tembani and Benjamin John Freeth (represented by Norman Tjombe) v Angola & Thirteen Others*, held that the African Charter on Human and Peoples’ Rights did not contain a specific right of access to the SADC Treaty. Rather the right of access to justice, guaranteed both jointly and separately in Articles 7 and 26 of the African Charter, was limited to guaranteeing access to national courts (at para 139). Where national courts failed to provide a fair trial, that other international fora such as the Commission, amongst others, were still available to the parties even if the SADC Tribunal was suspended at the time of application (at para 142).
39 Ibid at para 83.
41 Ibid art 14.
43 Ibid at paras 50–51.
44 Ibid at para 75.
IV  THE CONSTITUTIONAL RIGHT OF ACCESS TO COURTS: BEFORE AND AFTER LAW SOCIETY

In the previous section, I showed how the Court’s reasoning in Law Society indicated that the right of access to courts under s 34 was the right under threat in that case. In this section, I explain what it means to read the judgment as having expansively interpreted s 34 to apply to international courts. First, I provide an overview of the scope of the right of access to courts protected by s 34 up to the judgment in Law Society. As I have explained above, Law Society extended the domestic right of access to courts to encompass international and regional courts — but it is not clear to what extent the right, as developed in the domestic context, will apply internationally.

I consider the interpretation of the following elements of s 34, namely ‘access’, ‘dispute’, and ‘court, or … independent and impartial tribunal or forum’ before Law Society. I also briefly outline its relationship with s 38, and the interpretation of ‘competent court’ in that section. I then discuss the Constitutional Court’s expansion of the content of s 34 in Fick, by developing the common law on the enforcement of foreign judgments to include the enforcement of the decisions of international courts. I point out that, even though this expansion dealt with enforcing international decisions, it was still primarily concerned with access to South African courts on the domestic plane. Fick therefore does not provide much assistance in understanding how far the application of s 34 extends when dealing with international courts. The approach in Law Society is novel as it is the first time the scope of s 34 has been expanded to include access to justice on an international plane.

A  Access to courts before Fick and Law Society

The right of access to courts is related to all the substantive rights in the Constitution. This is because it obliges the state to provide for meaningful access to an impartial forum for the resolution of disputes arising out of the infringement or threat of infringement of substantive rights, including those in the Bill of Rights. The most significant elements of the right of access to courts are ‘access’; ‘fair hearing’; ‘public’; ‘dispute that can be resolved by the application of law’ and ‘court, or where appropriate, another independent and impartial tribunal or forum’. The case law so far has revolved around the interpretation of these elements.45 Important areas of development have included: the development of the principle of open justice, which requires proceedings and court records to be open to the public; equality of arms; and state-funded legal representation amongst others.46 The right to enforcement of a remedy under s 38 is also a significant development, drawing on the interpretation of access to courts as ‘meaningful

46  For open justice and public hearing, see Independent Newspapers (Pty) Ltd v Minister for Intelligence Services (Freedom of Expression Institute as Amicus Curiae) In re: Maseltha v President of the Republic of South Africa & Another (Independent) [2008] ZACC 6, 2008 (5) SA 31 (CC), 2008 (8) BCLR 771 (CC), for public access to hearings and documents see Mail and Guardian Media Ltd & Others v Chipu NO & Others [2013] ZACC 32, 2013 (11) BCLR 1259 (CC), 2013 (6) SA 367 (CC), for right to legal representation see Legal Aid South Africa v Magidiwana & Others [2015] ZACC 28, 2015 (6) SA 494 (CC), 2015 (11) BCLR 1346 (CC).
access’ under s 34, thus imposing an obligation on the state to provide ‘effective’ relief. In all of these cases, the state’s obligations have been developed in relation to access to domestic courts and dispute resolution mechanisms. Additionally, the disputes in question have been those that have arisen on the domestic plane.

B Access to courts after Fick

Until the Constitutional Court’s decision in Fick, ‘dispute’ and ‘court’ had been interpreted to mean domestic disputes capable of resolution by law in a domestic court (or alternative forum within the country). Fick and Law Society have their origins in the same underlying dispute involving land reform in Zimbabwe. I have already provided an overview of Fick in Part II. In brief, the Fick case involved the enforcement of a decision of the SADC Tribunal against Zimbabwe. The matter at the Tribunal was brought in 2007, by affected white Zimbabwean farmers who challenged the Zimbabwean government’s agrarian reform policy. The policy consisted of expropriation without compensation of identified tracts of agricultural land by the state’s ‘acquiring authority’ as appointed by the President. Further, the policy barred any challenges to it in domestic Zimbabwean courts. The Tribunal held in favour of the farmers. It ordered that compensation must be paid by the Zimbabwean government to those whose lands have been expropriated, and that existing ownership, possession and occupation should be protected. When Zimbabwe failed to comply, the case was referred to the Summit and a costs order passed against Zimbabwe. Due to further non-compliance on part of the Zimbabwe government, the farmers approached South African courts for service, registration and execution of the costs order in South Africa.

The key issue before the Constitutional Court was whether South African courts had the jurisdiction to enforce the Tribunal’s costs order against Zimbabwe. In answering this question, Fick developed the common law to include international ‘disputes’, to enable access to South African domestic courts for the enforcement of SADC Tribunal decisions. It stated that ‘[s]ection 34 of the Constitution must therefore be interpreted, and the common law developed, so as to grant the right of access to our courts to facilitate the enforcement of the decisions of the Tribunal in this country. This, as said, will be achieved by regarding the Tribunal as a foreign court, in terms of our common law.’ Regardless of the implications of treating the SADC Tribunal as a ‘foreign court’ for the purposes of enforcement, it is clear that Fick’s expansive interpretation of s 34 broadened the ambit of ‘dispute’ to include

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47 Brickhill & Friedman (note 45 above) at 59–98.
50 Modderklip Boerdery (note 48 above) at para 38.
51 Fick (note 8 above) at para 12.
52 Ibid at para 14.
53 Ibid at para 15.
54 Ibid at para 69.
55 These implications are explored in E de Wet ‘The Case of Government of the Republic of Zimbabwe v Louis Karel Fick: a first step towards developing a doctrine on the status of international judgments within the domestic legal order’ (2014) 17(1) PER: Potchefstroomse Elektroniese Regsblad 554–612.
disputes within the jurisdiction of international courts and tribunals based on the international agreements that bind South Africa. The Court in *Fick* explained that:

[to give practical expression to the enjoyment of this right [s 34], even in relation to judgments or orders of the Tribunal, articles 32(1) and (2) of the Tribunal Protocol and s 34 of the Constitution must be interpreted generously to grant successful litigants access to our courts for the enforcement of orders, particularly those stemming from human rights or rule of law violations provided for in treaties that bind South Africa.]

But the definition of ‘courts’ and of ‘access’ for the purposes of enforcement remained confined to South African domestic courts in the *Fick* judgment, until *Law Society*.

C  Access to courts after *Law Society*

*Law Society*, on the other hand, appears to interpret both ‘disputes’ and ‘courts’ to extend to the international plane, significantly modifying the pre-existing position. After *Law Society*, the scope of the right of access to courts under s 34 includes access to international courts for the resolution of international disputes. The judgment describes the President’s acts as having denied South Africans and SADC citizens access to justice at a regional level including those disputes that relate to ‘human rights, democracy and the rule of law’. In interpreting the scope of application of s 34, the Court recognised that access to the Tribunal reinforced the existing right of individual access to courts guaranteed by the Constitution. Effectively, the Court held that since the right of access to courts already existed in the Bill of Rights, and that the Tribunal served as a means to vindicate that right, the President could not act so as to curtail or threaten to curtail the realisation of that right. Doing so would be a violation of the President’s obligation to respect, protect, promote and fulfil s 34, under s 7(2) and s 8(1) of the Constitution. The Court went on to hold that ‘[t]he obligation to respect, protect, promote and fulfil the rights in the Bill of Rights, which includes the right of access to justice, does not only find application at a domestic level. It is inseparable from whatsoever is done in the name of the State, regardless of where and with whom’.

Even the minority judgment (the concurrence), which differed from the majority on the first and second grounds (legality and rationality review), held that—

[b]y agreeing to amend the Treaty and by thus agreeing to strip away pre-existing rights of access to justice that the Treaty had conferred on South Africans, the President failed to fulfil his obligation, under our Constitution: to ‘respect, protect, promote and fulfil’ the rights in the Bill of Rights. That failure was a breach of the Constitution. The unlawfulness of the President’s conduct derived from its breach of ss 7(2) and 8 of the Constitution. It did not derive directly from any violation of international treaty provisions.”

Although the concurring judgment did not analyse the extent of state obligations in relation to an expansive interpretation of s 34, it seemed to ground its basis for review of presidential power in ss 7(1) and 8(2) stemming from the violation of a right in the Bill of Rights, best

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56 *Fick* (note 8 above) at para 53.
57 Ibid at para 62.
58 *Law Society* (note 2 above) at para 15.
59 Ibid at para 75, 83.
60 Ibid at para 101.
61 Ibid at para 78.
62 Ibid at paras 98–102. I do not explore these grounds in this article. Other contributions to this volume do so.
63 Ibid at para 101.
understood to be the right of access to courts. On this reading of Law Society, it is clear that there the Court relied on s 34 as the right in the Bill of Rights (to which both judgments refer) that had been infringed by the President. Since his conduct was not a law of general application, and rather in the nature of executive acts, the infringing acts could not be saved through a s 36 limitations analysis. The establishment of s 34 having been infringed by the President was sufficient.

What the Court effectively did was assert that s 34 henceforth applied to international and regional courts. The Court, however, did not raise and answer the following questions: What interpretive considerations support this expansive construction? What are its implications? To which particular international and regional courts and tribunals does this right extend? Consequently, what is the extent of the state’s obligation to respect, protect, promote and fulfil in relation to the expansive interpretation of the right? And what are the limitations to this right? I outline possible responses to these questions briefly in the final Part of the article.

As an immediate next step, though, I discuss what the Court did in relation to outlining the ‘Treaty right’ of access to justice. Recall that the majority referred to twin rights of access to justice on the international and domestic planes and repeatedly relied on a ‘[t]reaty right’ in addition to the Constitution. In my view, the Court’s reasoning is best understood here as invoking the SADC Treaty and the 2000 Protocol. The ‘Treaty right’ is the ‘pre-existing right of individual access to the Tribunal’. I also raise the questions that the Court did not, and in my view, should have asked in relation to the domestic applicability of the SADC Treaty and the 2000 Protocol. This is inextricably linked to the provisions of the Constitution that regulate the relationship between international and domestic law.

IV ‘TREATY RIGHTS’ AND THE RELATIONSHIP BETWEEN INTERNATIONAL AND DOMESTIC LAW

Careful treatment of the relationship between international and domestic law is necessary to understand the domestic effect of South Africa’s acts on the international plane. In this Part, I first provide an overview of what the Court did in relation to asserting the existence of a ‘Treaty right’ that was capable of generating domestic obligations. Second, I discuss what the Court did not do, in relation to its lack of a close analysis of s 231 of the Constitution, and the implications of this lacuna. Finally, I outline the questions that the Court should have asked, and provide the beginnings of possible avenues of analysis.

The Court identified, as described above in Part II, a treaty-based right of access to the SADC Tribunal emanating from the 2000 Protocol, read with the principles and Preamble of the SADC Treaty. Individuals of all SADC member states, including citizens of South Africa are the rights-bearers as recognised by the judgment. The judgment also recognised that the impugned acts of the President were contrary to South Africa’s binding international obligations and cited the following passage from Fick in support of its holding:

South Africa has essentially bound itself to do whatever is legally permissible to deal with any attempt by any Member State to undermine and subvert the authority of the Tribunal and

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64 Ibid.
65 Ibid at para 29.
66 Ibid at para 72.
67 Ibid at para 15.
68 Fick (note 8 above) at para 59, cited in Law Society (note 2 above) at paras 54, 73.
its decisions as well as the obligations under the Amended Treaty. Added to this, are our own constitutional obligations to honour our international agreements and give practical expression to them, particularly when the rights provided for in those agreements, such as the Amended Treaty, similar to those provided for in our Bill of Rights, are sought to be vindicated.

The Court appeared to assume direct applicability of this right to South Africans and citizens of SADC member states throughout the judgment, without substantiation. In determining the constitutionality of the President’s impugned acts, the Court held that the President acted ultra vires his powers under s 231 in ‘sign[ing] away [South Africans’]… treaty right of access to justice’. In doing so, the Court began its analysis of s 231(1) by asking whether the President had been permitted to ‘take away a pre-existing individual right of access to the Tribunal’. It went on to limit the exercise of Presidential power to negotiate international agreements under s 231(1) by stating that ‘[t]he President may … not approve anything that undermines our Bill of Rights and international law obligations’.

Neither the minority nor the majority interrogated the above assumption. Neither judgment closely interpreted and applied the constitutional scheme in s 231 to the SADC Treaty and 2000 Protocol. This affects the strength of the assertion of a treaty-based right as well as the extent of corresponding obligations imposed upon the state in fulfilling this treaty-based right. In other words, the Court did not analyse the legal status of the SADC Treaty and 2000 Protocol: do the relevant provisions in these instruments impose obligations upon South Africa to facilitate access to the Tribunal? If so, which provision of the Constitution enables the recognition and vindication of this right?

Section 231 recognises four categories of treaties: first, agreements that require Parliamentary approval before internationally binding South Africa (s 231[2]); second, agreements that are required to be tabled in Parliament after South Africa has consented to be bound internationally by them (s 231[3]); third, agreements that are considered to have the effect of domestic law but only once enacted by Parliament (s 231[4]); fourth, certain provisions of agreements under s 231(2) that are directly applicable as long as these provisions are consistent with the Constitution (also covered by s 231[4]); and fifth, treaties that have already been entered into before the democratic era (s 231[5]). Section 231 reads as follows:

231. (1) The negotiating and signing of all international agreements is the responsibility of the national executive.
(2) An international agreement binds the Republic only after it has been approved by resolution in both the National Assembly and the National Council of Provinces, unless it is an agreement referred to in subsection (3).
(3) An international agreement of a technical, administrative or executive nature, or an agreement which does not require either ratification or accession, entered into by the national executive, binds the Republic without approval by the National Assembly and the National Council of Provinces, but must be tabled in the Assembly and the Council within a reasonable time.

Direct applicability of a treaty provision means that that provision is applied by courts and governmental organs as if it were a provision of domestic law within the state, without the need for any additional legislative or administrative steps to be taken. The second half of this Part deals with direct applicability in more detail.

Law Society (note 2 above) at para 85.
Ibid at para 72.
Ibid at para 77.
(4) Any international agreement becomes law in the Republic when it is enacted into law by national legislation; but a self-executing provision of an agreement that has been approved by Parliament is law in the Republic unless it is inconsistent with the Constitution or an Act of Parliament.

(5) The Republic is bound by international agreements which were binding on the Republic when this Constitution took effect.

The consequence of incorporation under s 231(4) is that after the enactment of domestic legislation, the domestic law forms the source of enforceable legal rights and obligations on the domestic plane. The international agreement is not directly enforceable domestically in South Africa. What is directly enforceable is the domestic law that incorporates this agreement. The international agreement only has domestic interpretive effect which I will return to later. In the event of conflicting domestic legislation, s 233 is applicable. Section 233 states that ‘[w]hen interpreting any legislation, every court must prefer any reasonable interpretation of the legislation that is consistent with international law over any alternative interpretation that is inconsistent with international law’. This set of incorporated agreements, is a small subset of the larger category of agreements under s 231(2), which do not attain the status of domestic law, but still remain binding on the international plane and provide domestic interpretive guidance.

Before Glenister II,74 in order for an international treaty provision to create direct rights and obligations (and if the provision at issue was not a self-executing one), s 231(4) required that the treaty be domesticated through an Act of Parliament.75 Glenister II complicated this position by holding the government in breach of its duty under s 7(2) without specifying a single right in the Bill of Rights or a single provision in the Constitution. Rather, the majority decision was based on a general obligation underlying the realisation of all rights in the Bill of Rights as well as various cited provisions of the Constitution to determine the duty of the state to fight corruption by establishing an independent anti-corruption unit.76 The position in South African law after Glenister II is that it is now possible to determine that the state has enforceable domestic obligations from a right that underlies both the Bill of Rights and a treaty approved by Parliament and ratified by South Africa under s 231(2). This has been critically analysed in a number of academic articles,77 but it is nevertheless echoed in the logic behind the Law Society decision, as I explore below.

The second part of s 231(4) recognises that certain ‘self-executing’ provisions of those treaties approved by Parliament (ss 231(2) treaties) may, without more, be considered to be on par with domestic law without the necessity for additional domestic legislation. This means


74 Glenister v President of the Republic of South Africa & Others [2011] ZACC 6, 2011 (3) SA 347 (CC), 2011 (7) BCLR 651 (CC) (‘Glenister II’).

75 Ibid at 99.

76 Ibid at paras 175–176.

that these ‘self-executing’ provisions of treaties are a direct source of rights and obligations and enforceable as domestic law would be in South African courts. Although this argument was not brought up by any of the parties in oral or written submissions, I explore below the possibility that the jurisdiction provision detailing the jurisdiction of the SADC Tribunal is self-executing.

At the outset, however, it is important to outline what it means for a treaty to bind South Africa. There are two planes on which South Africa as a state may be bound — the more familiar, domestic and constitutional plane, and the international plane. The consequence of South Africa being bound at international law is that other states and treaty bodies may hold South Africa responsible for lack of compliance or breaches of treaty obligations in an international forum having jurisdiction in the matter. This would take place if an aggrieved state were to establish that South Africa had committed an internationally wrongful act (breach of its international treaty obligations, for instance) that was attributable to South Africa. The domestic effect of South Africa being bound internationally, on the other hand, includes the possibility that its citizens could hold the state accountable in domestic courts to enforce certain treaty provisions or to require the state to act consistently with such provisions. The majority judgment’s treatment of the Vienna Convention on the Law of Treaties (‘VCLT’) — particularly its reference to art 26, the obligation on states to act in good faith in performing their treaty obligations — should be read to reflect this distinction rather than applying to the President himself as suggested by some parts of the text. This is one of the points made by the brief concurring judgment and addressed in detail by other authors in this volume.

Returning to the key questions: what are the obligations that directly arise from s 231(2) treaties on the domestic plane, if any? Is s 231(4) on self-executing provisions of treaties applicable here? If so, what are the obligations that arise domestically? These are the questions that the Court should have asked in Law Society, in order to determine the nature of the rights conferred by the SADC Treaty and the 2000 Protocol, if any. As described above, the 2000 Protocol conferred jurisdiction on the SADC Tribunal over individual disputes. It effectively created an international obligation upon member states of SADC to facilitate individual access to the SADC Tribunal. The majority assumed that this right was directly enforceable under South African domestic law without considering the role of s 231. Assuming direct applicability of a treaty provision to citizens of South Africa, as the majority did, thereby creating enforceable domestic obligations, muddies the interpretive landscape and runs the risk of rendering s 231’s system of treaty classification redundant.

The SADC Treaty, as noted above, was not enacted by Parliament in terms of s 231(4). This is in contrast to the Implementation of the Rome Statute of the International Criminal Court Act for instance, that was domestically enacted to implement the Rome Statute in South Africa. Instead, the SADC Treaty was approved by Parliament following a procedure akin to that which is prescribed by s 231(2) and no further action was taken to domesticate

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78 Articles on Responsibility of States for Internationally Wrongful Acts (note 22 above). The provisions on definition of internationally wrongful act and attribution have widely been accepted to codify principles of customary international law. On this point, see J Crawford ‘State Responsibility’ in Max Planck Encyclopedia of Public International Law (2006).

79 Law Society (note 2 above) at paras 54, 79, 80.

80 See for instance, D Tladi (note 29 above).

81 27 of 2002.
it. It is therefore clearly binding upon South Africa internationally, but what domestic effect does it have, if any? The Court is silent on this issue.

I advance two possible ways in which the obligations imposed upon South Africa by the SADC Treaty could have been analysed by the Court. The first is that, despite the language of ‘Treaty right’, international law was simply being used to interpret s 34 of the Constitution. The second is that the relevant provisions of the 2000 Protocol and SADC Treaty were self-executing. I consider each in turn.

The first possibility is that any rights created by the SADC Treaty and the 2000 Protocol, if mirrored in the Bill of Rights, trigger the set of obligations under ss 7(2) and s 8(1) of the Constitution (the Glenister II approach). Even in Glenister II though, the Court was at pains to highlight that the obligation in that case was ‘not an extraneous obligation, derived from international law and imported as an alien element into our Constitution’. In Law Society, we do not even need to go that far — because here the Court has already identified a specific right in the Bill of Rights (s 34) rather than stating that the underlying premise of all the rights in the Bill of Rights is threatened or violated by the impugned acts as was the case in Glenister II. In light of this, the proper interpretation of the obligations generated by the ‘Treaty right’ would necessarily take place as a facet of s 34 of the Bill of Rights. This means that the substantive obligation here is one that stems from a violation of s 34 — and the ‘Treaty right’ enters the analysis through the application of s 39(1)(b) to the interpretation of s 34. Apart from a cursory mention of s 39(1)(b) at the start of the judgment, the Court does not apply the section in interpreting s 34, the constitutional right of access to courts. Section 39(1)(b), which enjoins courts to take into account international law in interpreting the Bill of Rights, would provide an interpretive bridge to the provision in the 2000 Protocol detailing the Tribunal’s individual jurisdiction. It would explain the Court’s recognition of ‘access to the Tribunal as an important instrument for the reinforcement of the constitutional right of access to justice in South Africa’ (emphasis added). The significance of individual jurisdiction may be understood through the prism of the development of international human rights law — specifically, the rise of international treaty bodies dealing with the implementation, monitoring and adjudication of human rights obligations.

Second, the alternative argument is that the provision outlining the Tribunal’s jurisdiction in the 2000 Protocol is self-executing and does not require domestic enactment for enforcement of obligations domestically. This argument was not considered by the Court. Although the parties did not bring it up in the oral or written submissions, given its significance to the case, the Court may have called for directions on the issue, as it occasionally does, or brought

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82 This is endorsed by Law Society (note 2 above) at para 77.
83 Glenister II (note 74 above) at para 197.
84 Law Society (note 2 above) at para 5, fn 5.
85 Ibid at para 75.
87 As it has done several times, for parties to make written submissions on a point of law — for instance, recently in Jacobs & Others v S [2019] ZACC 4, 2019 (5) BCLR 562 (CC).
it up *mero motu* in oral argument.\(^88\) The latter half of s 231(4) encapsulates the relationship between self-executing provisions of treaties approved by Parliament, and the Constitution. Self-executing treaty provisions become law in the Republic without any further steps, whilst other treaty provisions require an act of Parliament for the same effect. The question that the Court should have asked at this stage is: What does a self-executing provision of a treaty look like? This issue has been written about extensively in the context of the United States of America’s declarations at the time of ratifying international human rights treaties.\(^89\) The South African Constitution imported this phrase from the US\(^90\) — but there has been little to no engagement with it by the courts,\(^91\) even when it is arguably applicable.\(^92\) The Constitutional Court had ample opportunity to develop the law on this point in *Quagliani*\(^93\) and has been criticised by commentators for not doing so,\(^94\) despite the fact that the High Court in *Goodwin* interpreted the phrase and took the position that it was applicable, in contrast with the High Court in *Quagliani*.\(^95\) In *Claassen*, there was cursory treatment given to the question of whether the International Covenant on Civil and Political Rights (ICCPR) was a self-executing treaty. The Court briefly stated the conclusion that the ICCPR is not a self-executing treaty, because for the provision in question to be given its full effect, domestic legislation is required.\(^96\) No further analysis was undertaken.

To underscore my argument on the relevance and application of this provision to *Law Society*, it is helpful to lay out the substantive test for self-executing provisions developed in international law and the US.\(^97\) Courts in the US have consistently held that a provision of a treaty is self-executing if it does not require an additional domestic legislative step to be

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\(^88\) *Maphango & Others v Aengus Lifestyle Properties (Pty) Ltd* [2012] ZACC 2, 2012 (3) SA 531 (CC), 2012 (5) BCLR 449 (CC).


\(^90\) N Botha ‘Treaty-making in South Africa: A Reassessment’ (2000) 25 *South African Yearbook of International Law* 69 at 91; Dugard & Coutsoudis (note 73 above) at 82.

\(^91\) As I have described through the case law cited in this article. See also, Dugard & Coutsoudis (note 73 above) at 85 arriving at the same conclusion ‘South African courts are reluctant to explore the meaning of the term “self-executing”’. For instance, in *Krok v Commissioner SARS* [2015] ZASCA 107, 2015 (6) SA 317 (SCA) at para 24. However, in *Krok*, the SCA held that s 108 operates as a deeming provision in the Income Tax Act 58 of 1962 to pre-emptively incorporate double-taxation avoidance agreements thus avoiding any discussion of self-executing treaties.

\(^92\) For instance, in *President of the Republic of South Africa & Others v Quagliani, President of the Republic of South Africa & Others v Van Rooyen & Another; Goodwin v Director-General, Department of Justice and Constitutional Development & Others* [2009] ZACC 1; 2009 (4) BCLR 345 (CC); 2009 (2) SA 466 (CC).


\(^95\) *Claassen v Minister of Justice and Constitutional Development & Another* [2009] ZAWCHC 190, 2010 (2) SACR 451 (WCC), [2010] 4 All SA 197 (WCC) at para 36.

\(^96\) *This is a method of constitutional interpretation (s 39(1)(b) as analysed above that mandates courts to consider international law, and s 39(1)(c) that allows courts to consider foreign law*.}
In other words, if the provision is *directly applicable* in the state, it is on par with domestic law. Moreover, the Permanent Court of International Justice has also confirmed this interpretation in its *Danzig* case in the context of direct applicability of certain treaty provisions enabling railway employees to make domestically enforceable claims on the basis of an international agreement.

In relation to identifying self-executing treaties, Judge Yuji Iwasawa, before his appointment to the International Court of Justice, laid out a set of criteria that emerge from the US and European case law on the issue, to be taken into account by the relevant body in identifying whether a provision is self-executing. I will provide an overview of those subjective and objective factors as they relate to the VCLT and domestic law. Since the task before a court adjudicating upon this matter is essentially one of treaty interpretation, the factors include the text of the treaty as well as its surrounding context taken together with subsequent practice of states and other relevant rules of international law as enshrined in art 31 of the VCLT; the *travaux preparatoires* and intention of the drafters under art 32 of the VCLT to confirm the interpretation; the nature of the obligation incumbent upon the contracting parties, if any; the subject matter of the provision; the laws to be passed or any further measures that would be required to be taken in the state in order to ensure that the provision is operative, if any. Iwasawa also chronicles the debate on whether treaty provisions may be self-executing even if they do not create individual rights and obligations — however, for the purposes of *Law Society*, it is clear that the provision in dispute *does* indeed create the individual right of access to the Tribunal as has been repeatedly held by the Court in this judgment. Applying the rest of Iwasawa’s criteria — essentially engaging in an exercise of treaty interpretation of the SADC Treaty and the 2000 Protocol — it is certainly arguable that the provision guaranteeing individual jurisdiction of the Tribunal is self-executing. No additional domestic legislation or other step was necessary to allow individuals to make use of the jurisdiction of the Tribunal. The jurisdiction provisions of the SADC Treaty and the Protocol appear to be self-executing. This would provide a framework for the Court’s ultimate conclusion that a pre-existing right was taken away solely by the President’s impugned conduct on the international plane, without any corresponding acts on the domestic plane.

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100 *Advisory Opinion on Jurisdiction of the Courts of Danzig* (1928) PCIJ Series B no 15 at 37.


102 Ibid at 87–90, 125–129.
A similar approach, substantively limited to human rights treaties, has been proposed by some academic commentators in the South African context. Insofar as the self-executing provision is consistent with the Constitution and existing legislation, it must be given effect to on par with domestic law, and without the need for additional legislation. Given the Court’s emphasis on the nature of the SADC Treaty and its attendant 2000 Protocol, and the recognition that individual jurisdiction is particularly important to resolve disputes concerning ‘human rights, rule of law and democracy’, self-executing provisions have an important role to play in this case.

I have thus outlined two possible frameworks of analysis that the Courts could have carried out in arriving at the outcome it reached. It is worrying that the Court at best assumed the first framework of analysis in its judgment, and entirely ignored the second framework. In any event, in order to understand the future implications of the outcome as well as of the thin reasoning of the Court, I will explore the extent of obligations that both of these possible analyses impose upon South Africa in my next section.

V THE PRINCIPLE OF NON-RETROGRESSION

After having analysed the twin rights invoked in the Court’s judgment — first, the extension of s 34 to international courts, and second, the ‘Treaty right’ under the SADC Treaty and attendant Protocols — I now turn to the obligations that are imposed upon the state as flowing from these twin rights. In this Part, I engage with the extent of the state’s obligation in relation to the expanded right of access to courts on the international plane. Law Society offers a novel application of the principle of non-retrogression to the right of access to courts, in all but name. The term ‘non-retrogression’ is not expressly used in the judgment. In this Part, I explain how the principle of non-retrogression nevertheless underpins the Court’s approach to the extent of the state’s duty to protect and fulfil the right of access to courts under s 34.

I first provide an overview of the principle of non-retrogression and point out how it is not alien to South African constitutional jurisprudence. I then locate Law Society’s use of the principle in the language and reasoning of the majority. Following this, I explain that, although the Court does not spell this out, this principle may be used to qualify the expanded duty incumbent upon the state under s 34. I offer an analysis of the contours of this principle and its limitations — in other words, when (if ever) the state may ‘regress’ by taking away existing access to an international court following Law Society.

What is the principle of non-retrogression? The principle is found in international environmental law and socio-economic rights as a corollary and extension of the doctrine of progressive realisation. Progressive realisation requires the state to take steps towards the realisation of a right; non-retrogression bars it from moving backwards or ‘regressing’ once it

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has taken these steps to realise a right. The principle of non-retrogression (also known as the principle of non-regression) thus encapsulates an integral step towards the realisation of human rights — a move to a more just and equal society, without turning back. It guarantees that once the state has taken a step forward to realise a right, it must at the very least maintain that new standard of protection. In other words, the state may not renege on the positive, progressive measures that it may have taken in order to fulfil certain rights. The Committee on Economic, Social and Cultural Rights (CESCR) has derived the principle of non-retrogression from the International Covenant on Economic, Social and Cultural Rights (ICESCR), to which South Africa is a party. In General Comment No 3 the CESCR states that:

any deliberately retrogressive measure in respect of economic, social and cultural rights would require the most careful consideration and would need to be fully justified by reference to the totality of the rights provided for in the ICESCR and in the context of the full use of the maximum available resources.\(^{105}\)

The principle of non-retrogression may be understood in normative and empirical terms. The adoption of a legal measure with the effect of undermining or reducing existing legal guarantees undertaken by the state would fall within the category of normative retrogression, whilst the state’s failure to act in a situation where a social need for additional legal protection arises would fall within the category of empirical retrogression.\(^{106}\) In this case, we are concerned with normative retrogression, where there is a withdrawal of a legal entitlement of South Africans and members of SADC countries to access the SADC Tribunal. This principle is not new to South African courts. The Constitutional Court has quoted the above passage from the ICESCR to apply the principle of non-retrogression in \textit{Mazibuko}, to determine the scope of the state’s obligation in relation to the right to water,\(^{107}\) even though the Court did not ultimately find that a retrogressive step had been taken by the state. The same passage was also quoted in \textit{Grootboom},\(^{108}\) but for the purpose of describing the scope of progressive realisation rather than non-retrogression. The main judgment in \textit{Shoprite Checkers} invoked this principle in the context of resisting the use of pre-constitutional notions to limit the scope of the right to property under the Constitution.\(^{109}\) Moreover, this principle has been advanced in argument by one of the parties in \textit{Glenister II},\(^{110}\) the \textit{ICC Withdrawal} case,\(^{111}\) \textit{C v Department of Health and


\(^{107}\) \textit{Mazibuko and Others v City of Johannesburg and Others} [2009] ZACC 28, 2010 (3) BCLR 239 (CC), 2010 (4) SA 1 (CC) at para 40.


\(^{110}\) \textit{Glenister II} (note 73 above) at paras 73, 157.

Social Development, Gauteng.\textsuperscript{112} Law Society of South Africa \textit{v} Minister for Transport,\textsuperscript{113} Joseph \textit{v} City of Johannesburg.\textsuperscript{114} In all of these cases, however, the Court did not base its decision on the principle of non-retrogression.

Internationally, the principle has been affirmed by the UN Special Rapporteur on the right to safe drinking water.\textsuperscript{115} The regional Inter-American Human Rights System has applied and developed this principle in cases concerning the right to health,\textsuperscript{116} social security,\textsuperscript{117} and more recently labour rights\textsuperscript{118} on the textual basis of art 26\textsuperscript{119} of the Inter-American Charter, whilst the European Court of Human Rights has briefly done so (albeit in a minority judgment) in the context of non-discrimination and parental leave.\textsuperscript{120} The principle has also been applied in relation to equality of citizenship, particularly in Northern Ireland,\textsuperscript{121} and in the UK, in relation to the environment\textsuperscript{122} and economic, social and cultural rights.\textsuperscript{123} Additionally, the recent Indian Supreme Court decision that decriminalised homosexuality applied this principle,\textsuperscript{124} as well as a recent decision of the Hong Kong Court of Final Appeal.\textsuperscript{125} The Colombian Constitutional Court has upheld this principle in relation to affirming the fundamental right to health (despite resource implications)\textsuperscript{126} and gender equality in relation to taxation policy.\textsuperscript{127}

\textsuperscript{112} C \& Others \textit{v} Department of Health and Social Development, Gauteng \& Others [2012] ZACC 1, 2012 (2) SA 208 (CC), 2012 (4) BCLR 329 (CC) at para 17.
\textsuperscript{113} Law Society of South Africa \& Others \textit{v} Minister for Transport \& Another [2010] ZACC 25, 2011 (1) SA 400 (CC), 2011 (2) BCLR 150 (CC) at para 87.
\textsuperscript{116} ‘Five Pensioners’ \textit{v} Peru IACtHR, Series C no 98, February 28 2003 at para 147.
\textsuperscript{117} Dismissed Employees of Petroperu et al \textit{v} Peru, IACtHR Series C no 344, 23 November 2017 at para 196. See also Lagos del Campo \textit{v} Peru, IACtHR Series C no 340, 31 August 2017 as cited in \textit{Case of Dismissed Employees of Petroperu et al v Peru}.
\textsuperscript{118} Acvedo Buendia (“Discharged and Retired Employees of the Comptroller”) \textit{v} Peru, IACtHR Series C no 198, 1 July 2009 at paras 102–103 developing the content of art 26 even though it held that art 26 was not violated in this case.
\textsuperscript{123} Navtej Singh Johar \textit{v} Union of India AIR 2018 SC 4321 at paras 188–189.
\textsuperscript{124} Kong Yunning \textit{v} Director of Social Welfare (2013) 16 HKCFAR 950 at paras 179–180 (Bokhary NPJ).
\textsuperscript{125} Colombian Constitutional Court, Decision T- 760 of 2008.
\textsuperscript{126} Colombian Constitutional Court, Decision C-111 of 2018.
The Joint Human Rights Committee in the UK, in detailing the UK’s international obligations under the ICESCR also affirmed the applicability of the principle of non-retrogression.128

Two recent developments, however, indicate the international community’s consideration of the principle as having wider application, in situations that are arguably analogous to Law Society. First, in the context of ‘Brexit’, a report by stakeholders in the UK outlined the need for a non-retrogression clause in the Withdrawal Agreement from the European Union. This was in relation to equality and non-discrimination laws, to ensure that the UK did not renege on the EU standards of protection after Brexit.129 Second, in the South African context, this principle was argued before the High Court in relation to treaty withdrawal — that South Africa’s withdrawal from the Rome Statute constituted a retrogressive measure which engaged s 7(2) through a violation of the state’s duty to protect, promote, respect and fulfil the Bill of Rights. The decision in that case was ultimately made on procedural irregularities and so the Court did not go into the merits of the substantive grounds. Commentators have analysed the implications of this argument as meaning that the state, through the executive and legislature, may not withdraw from international treaties if the courts hold that such a withdrawal violates or threatens to violate rights in the Bill of Rights.130 Taking this argument at its highest: ‘the courts would be vested with the power to require the state to remain a party to certain treaties in perpetuity’.131 The implication is that courts would be able to check the treaty-making power of the executive and legislature to the extent to which it is unconstitutional. The holding in Law Society is based on similar reasoning, as I describe below.

Law Society does not explicitly refer to the principle of non-retrogression as such. However, it uses equivalent language and offers an account of what the application of the principle of non-retrogression looks like in practice. The judgment characterises the impugned acts of the President as having ‘unabashedly sought to put us [South Africa] and the people of SADC in a position that is worse than before.’132 It further states, in relation to the state’s obligations under s 7(2), that the proper exercise of the President’s power must comply with the obligations to respect, protect, promote and fulfil the rights under the Bill of Rights — ‘[t]here is just no room for deviation, particularly where citizens’ existing rights are likely to be undermined or extinguished at any level where they used to be enjoyed.’133 Most explicitly, although it still does not use the term ‘non-retrogression’, the Court states that ‘it is constitutionally impermissible, as long as our Constitution and the Treaty remain unchanged, for the President to align herself with and sign a regressive international agreement that seeks to take away the citizens’ right of access to justice at SADC level’.134 This analysis falls squarely within the category of normative non-retrogression as described above.

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128 UK Joint Committee on Human Rights, Twenty-First Report (Session 2003–04) at para 50.
131 Ibid.
132 Law Society (note 2 above) at para 79. (Emphasis added.)
133 Ibid at para 78. (Emphasis added.)
134 Ibid at para 82. (Emphasis added.)
What work does the principle of non-retrogression do in this judgment? A reading of these passages in the judgment, along with the provisions on the right of access to justice in the Constitution indicates that to the extent to which the principle of non-retrogression is applicable, it may be characterised as a qualification of the duties imposed upon the state under s 7(2). This formulation is in effect an application of the principle of non-retrogression, where the breach of the President’s duty under s 7(2) is found in his acts that circumscribed the expanded protection of s 34 offered to South Africans through the accession to the SADC Treaty and its attendant 2000 Protocol. The principle of non-retrogression here is a manifestation of the President’s duty to protect and fulfil the s 34 right of access to courts as interpreted along with s 39(1)(b). It is also a manifestation of the duty to respect the right of access to courts in that the state must not act so as to take away or inhibit its realisation in any way.\(^{135}\)

VI IMPLICATIONS OF LAW SOCIETY

What are the principal implications of the Law Society judgment? Does the right of access to courts extend to any international dispute resolution mechanism that affords a right of individual communication? What is the content of the principle of non-retrogression and what are its limitations ie, are there circumstances in which the state may withdraw or diminish existing protections? I offer some provisional views on these questions in this final part.

First, I deal with the limits to the expanded scope of application of the right of access to courts. This has a procedural and a substantive dimension. The procedural limits relate to the status of the relevant international treaties under South African domestic law. It cannot be that the decision in Law Society guarantees a right of access to any international court in the world established under any treaty. Quite obviously, it cannot apply to international courts to which people in South Africa would not ordinarily have access, such as the Inter-American Court of Human Rights or the European Court of Human Rights.\(^{136}\) But beyond the clearly inapplicable scenarios, what are the limits to the Court’s decision? It is here that the majority’s loose approach to international law does not provide any clarity. If the Court had addressed the precise nature of the domestic of treaties ratified by South Africa pursuant to s 231(2) but not enacted into domestic law pursuant to s 231(4), the limits of the scope of application would have been clearer. Moreover, the Court missed an opportunity to develop the jurisprudence on self-executing provisions under s 231(4) as outlined above. Given South Africa’s recent ratification of treaties providing for international complaints procedures and individual jurisdiction, it was timely and relevant for the Court to have clarified the domestic effect of actually facilitating access to such mechanisms. Since the SADC Treaty followed a process akin to that outlined in s 231(2), arguably the holding in Law Society applies to all treaties that South Africa has ratified under s 231(2). Put simply, this includes those treaties that South Africa has ratified pursuant to s 231(2), which contain within their relevant constitutive document access to an international human rights dispute resolution mechanism.

Importantly, though, Law Society incentivises litigants (and by extension courts) to avoid properly interpreting the scheme under s 231. Simply put, Law Society’s approach does not

\(^{135}\) This is similar to the reasoning on negative obligations under the right to housing in Jaftha v Schoeman & Others, Van Rooyen v Stoltz & Others [2004] ZACC 25, 2005 (2) SA 140 (CC), 2005 (1) BCLR 78 (CC).

\(^{136}\) This is not to ignore the possibility of a person in South Africa having a right to access such an international court on the basis that their rights were violated while they were in another country that is party to an appropriate court.
require that any questions be asked beyond: has South Africa ratified a treaty pursuant to s 231(2)? If this question is answered in the affirmative, according to Law Society, there is no need to analyse whether the treaty has been domesticated under s 231(4) (or indeed if any of the provisions are self-executing) at all in order to determine the scope and content of rights and obligations that arise from it, and whether or not these rights and obligations are directly domestically enforceable. The only other inquiry that must be undertaken is whether the treaty at issue is mirrored in the Bill of Rights, or underlies the Bill of Rights as a whole. A key example of this reasoning is found in Chang— the first international law based decision emerging from a South African court after Law Society.137 The Court merely asked the question of whether South Africa had been party to the Protocol. After having answered this in the affirmative, the Court moved on to directly examine the state’s conduct in relation to ss 7(2) and 8(1), thus assuming rather than interrogating South Africa’s domestic obligations.138 This has shifted South Africa’s position significantly from explicit constitutional dualism on international agreements to what has been described as ‘creeping monism,’139 thus running the risk of rendering s 231(4) redundant in the process.

Another recent example would be South Africa’s ratification of the Optional Protocol to the UN Convention Against Torture (‘OP-CAT’).140 Law Society enables any person in South Africa to assert a right of access to the Committee Against Torture to file complaints, and a corresponding obligation upon the state to respect, protect, promote and fulfil that right. In particular, on the Law Society approach, the state has an obligation not to withdraw from OP-CAT or otherwise impede access to it, as this would amount to retrogression. It is even arguable that, after Law Society, the state now has a positive obligation to ratify additional protocols to international human rights treaties that provide for dispute resolution mechanisms, particularly if those treaties have resonance with the Bill of Rights. An example would be the Optional Protocol to ICESCR (which South Africa has not yet ratified), which allows individual complaints to be made, especially since South Africa has now ratified ICESCR itself. Another example, closer to home, would be the African Court on Human and People’s Rights whose explicit mission is ‘strengthening the human rights protection system in Africa and ensuring respect for and compliance with the African Charter on Human and Peoples’ Rights, as well as other international human rights instruments’.141 Whilst South Africa has ratified the Protocol that allows for complaints to be made against states parties, it is notably not among the nine states that have made a declaration enabling non-governmental organisations and individuals to file complaints. Does South Africa have a positive obligation to deposit a declaration of this nature or sign the Optional Protocol to the ICESCR? This would arguably take Law Society’s interpretation of the state’s obligations flowing from s 34 to its logical end. However, given that s 34 does not refer to ‘progressive realisation’, it may be more definitively argued that the state’s obligations are negative ie, limited to non-retrogression, rather than

137 Chang v Minister of Justice and Correctional Services & Others; Forum de Monitoria do Orçamento v Chang & Others [2019] ZAGPJHC 396.
138 Ibid at paras 70–71.
extending to a positive obligation to actively accede to and thereby confer access to further international dispute resolution mechanisms.

The Court in *Law Society* placed great emphasis on ‘human rights, democracy and the rule of law’,142 as foundational to the SADC Treaty and the South African Constitution. It would be appropriate to infer a substantive limit to the extended application of s 34 from this, namely that the right of access to courts is expanded to those international courts (subject to the procedural limit of s 231(2) ratification and approval) that allow for the realisation of the rights guaranteed in the Bill of Rights guarantees. Again, the Optional Protocol to ICESCR would be a good example, as it enables access to complaints mechanisms for socio-economic rights that are also guaranteed in the Constitution. South Africa is not a party to this protocol. However, what about international dispute resolution mechanisms that are not so closely related to rights in the Bill of Rights, such as international trade and investment dispute fora? It remains open for the courts to extend this to dispute resolution mechanisms less directly connected to human rights in future, but the language of *Law Society* suggests that it applies only where the particular international mechanism does relate substantively to a right in the Bill of Rights. This brings me to the principle of non-retrogression.

In response to the second question posed above, there is a need to clarify the content of the principle of non-retrogression that the Court appears to have applied. Might empirical retrogression, as described above, now found a cause of action in the South African courts? Or is it only normative retrogression that triggers a breach of the state’s duty under s 7(2)? The recent High Court decision requiring government to reinstate the National School Nutrition Programme during the global pandemic explicitly applied the principle of non-retrogression to the right of access to basic nutrition, and held that the justification advanced by the government for having taken retrogressive steps was not valid and amounted to a breach of the state’s constitutional and statutory duty.143 What are the criteria that need to be fulfilled for a measure to be a ‘deliberately retrogressive measure’ that is impermissible in international human rights law? Regard may be had to General Comment No 3 that lays out certain criteria that may be followed to make this determination: first, whether the measure is one that is ‘backwards’ or that withdraws protection; second, whether the maximum resources available to the state are being used; third, whether the measure was taken deliberately; fourth whether there was ‘careful consideration’ given before taking the measure; and fifth, whether the measure is justifiable in relation to the other rights protected by the ICESCR.144 Regard may also be had to General Comment No 19 which provides a further six factors that may aid the determination of a deliberately retrogressive measure.145 They are: first, whether the justification for the action was reasonable; second, whether there were alternative courses of action that were comprehensively considered; third, whether the groups who are affected by the measure had the opportunity to adequately participate in examining the measure and its alternatives; fourth, whether the


144 Warwick (note 104 above) at 478, distilling the criteria provided by General Comment No 3. See also, CESCR, ‘General Comment 3: The Nature of States Parties Obligations (art 2, para 1 of the Covenant)’ (1990) UN Doc E/1991/23.

measure discriminates in any form on the basis of protected characteristics; fifth, whether there will be a ‘sustained impact’ on the realisation of the right in question or whether the measure deprives individuals or groups from realising the right at the ‘minimum essential level’; and sixth, whether these measures were domestically reviewed at the national level.\footnote{Ibid. See also Warwick (note 104 above) at 478.} It is thus clear that content \textit{must} be given to the principle of non-retrogression should it be substantively applied in future cases. Insights may also be drawn from regional systems such as the Inter-American Human Rights System which has developed and applied the content of this principle as cited in the previous Part of this article.

Moreover, regarding the limits to the principle of non-retrogression, it cannot be that the state is barred ever, for all time and in any imaginable circumstances, from withdrawing from or restricting access to an international court or tribunal to which there is currently access. The standard cannot be absolute. Regard may be had to how the Court has treated progressive realisation in relation to socio-economic rights in formulating such limits.\footnote{Grootboom (note 108 above) at para 45.} The Court has held that the meaning of ‘progressive realisation’ in the ICESCR carries the same meaning in the context of the Constitution. In light of this, any step that degrades protection of a right ‘need[s] to be fully justified by reference to the totality of the rights provided for in the Covenant and in the context of the full use of the maximum available resources’.\footnote{Ibid.} This offers one possible threshold by which withdrawal from an international dispute resolution mechanism may be justified by the state, namely that any step backwards must be ‘fully justified’. An alternative might be that any retrogression requires justification under s 36 of the Constitution or that it must be ‘reasonable’, often the default standard for rights inquiries. There are thus a range of possible limitations that may be developed.

Moreover, \textit{Law Society} has broader implications for executive competence and the reviewability of executive action on the international plane. The rest of the judgment holds that international executive action is reviewable at the same standard as domestic executive action, within the framework of s 7(2) and s 8(1) of the Constitution.\footnote{Law Society (note 2 above) at para 46–47.} In effect, this means that any act of the executive, whether international or domestic, is also subject to legality review.\footnote{Ibid at para 48.} Thus, in its future treaty negotiations, or arguably even Security Council or UN General Assembly voting practices, the executive branch of the government must act to ‘respect, protect, promote and fulfil’ the Bill of Rights.\footnote{A Katz ‘The Constitution Watches over Foreign Affairs’ \textit{Daily Maverick} (14 December 2018), available at https://www.dailymaverick.co.za/article/2018-12-14-the-constitution-watches-over-foreign-affairs/.} In other words, South Africans may hold the executive to account in a court of law in South Africa, in the event that the executive does not fulfil its duties under s 7(2) in any of these circumstances or acts \textit{ultra vires} its competence on both — the international and domestic planes.\footnote{A detailed analysis of the reasoning behind and the implications of extending the application of legality review are outside the scope of this paper. This question is explored more fully in A Coutsoudis & M Du Plessis, ‘We Are All International Lawyers; Now What? Taking Seriously the Constitutional Injunction to Integrate International Law Obligations into South African Law’ (2020) 10 \textit{Constitutional Court Review} 155.}

Thus, while several questions as to the procedural and substantive limits of the decision in \textit{Law Society} remain, the decision has nevertheless entrenched heightened protection for
individuals (and groups) against any conduct by the state that would take away existing access to an international human rights dispute resolution forum or indeed any international court that seeks to protect rights mapping onto the Bill of Rights. The same result, in my view, could have been arrived at by the Court with a careful analysis of international law so as to ensure that provisions of the Constitution are properly interpreted, not rendered redundant, and South Africa’s constitutional relationship with international law remains intact. Law Society’s methodological missteps have highlighted the importance of proper engagement with international law in South African courts as South Africa is an important actor on the international plane and its domestic acts may have international implications for interpreting and applying international law. This article is thus an attempt to read the judgment in its best light, laying bare its assumptions to aid future jurisprudence on the treatment of international law in domestic courts.
South Africa’s Doctrinal Decline on the Right to Protest: Notification Requirements and the Shift from Fundamental Right to National Security Threat

JANE DUNCAN

ABSTRACT: In this article, I take the Constitutional Court cases of Garvis and Mlungwana as departure points to explore whether these judgments have set the South African government on the right path when it comes to freedom of assembly, and particularly the right to protest. Focusing specifically on the notification requirement in the Regulation of Gatherings Act, I look at whether actual municipal practices on the ground are opening or closing spaces for expressive conduct by the poorest and most marginalised in society, and whether the Constitutional Court has gone far enough to ensure a more open democratic system. I present empirical evidence that local governments use the notification process to produce pacified, unthreatening and undisruptive protests that they can simply ignore. As much of a victory as Mlungwana was for civil society, it is unlikely to change the existing problems with the way in which the state regulates and polices protests. Municipal over-regulation of protests, coupled with over-policing, suggests a doctrinal shift in how protests are viewed by the government. Instead of recognising protest as a democratic right and legitimate form of expression, increasingly protests have been framed as threats to domestic stability and, consequently, national security. This doctrinal shift has provided the framework for municipal overreach around gatherings, and specifically protests, and over-policing of public order situations. Mlungwana has taken an important step towards reforming the problematic notification process; but, unless the judgment is followed by a deeper and more consistent ideological and doctrinal commitment to respecting the right to protest and ensuring a more genuine incorporation of the masses into the political system — including by the Constitutional Court itself — then the changes are likely to be limited.

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KEYWORDS: freedom of assembly, municipalities, notification, permits, Regulation of Gatherings Act, South African protests
I  INTRODUCTION

In a significant judgment affirming freedom of assembly generally, and the right to protest more specifically, the South African Constitutional Court in *Mlungwana* found that a convener’s mere failure to give notice of an intention to hold a gathering should not be criminalised. Section 12(1)(a) of the Regulation of Gatherings Act (referred to hereafter as ‘the RGA’) — which gives effect to the constitutional right to freedom of assembly — requires the conveners of a gathering to notify municipalities of their intention to stage a gathering; before the Court judgment, failure to do so was a criminal offence for the convener.

The applicants in this case, the civil society movement, the Social Justice Coalition (SJC), challenged the constitutionality of this section of the RGA on the basis that it deterred the exercise of the right to assembly. The Court found that criminalisation was an unjustifiable limitation on freedom of assembly, and less restrictive means could be used to incentivise notification, which it recognised served important public purposes. In making this finding, the Court confirmed the finding of the Cape High Court, and rejected the respondent’s arguments (the state and the Minister of Police), that the failure to give notice would undermine the police’s ability to undertake effective monitoring of assemblies to prevent violence. The Court reasoned that while the notice requirement was a limitation on the right, the state had failed to establish the link between the administrative measure (giving notice) and the reduction of violent protests. It argued that the provision could lead to conveners of innocuous assemblies that posed no public safety risks, being criminalised, which could have calamitous effects on their lives and deter assemblies in future, and potentially catch child conveners in its wide net. However, in striking down the constitutionality of the section in the Act, the Court did not suggest alternative remedies, rather leaving it to the legislature to decide. The Court did note, though, that while administrative fines may be a less restrictive option, this option may prove to be unconstitutional, too, depending on the finer details of the administrative fining system. This ruling is particularly significant for the right to protest, as protests are more susceptible to government repression than ordinary gatherings. This is because protests are a particular species of gathering that are intended to voice dissent, often (but not exclusively) at government policies and/ or conduct; hence they are more likely to elicit defensive responses from government entities when they are criticised. As direct expressions of dissent, protests can bring matters to the attention of the authorities that they may not want to hear. Protests are popular and unmediated expressive acts, offering forms of communication to poor and marginalised people who may not otherwise have access to more conventional channels such as the media: a reality that the Court affirmed in its judgment. Hence, in a highly unequal country such as South Africa, where inequality truncates the public sphere and makes it susceptible to elite capture, protecting the right to protest is closely related to protecting the right to freedom of expression. Consequently, in dealing with assembly law, the Constitutional

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1 *Mlungwana & Others v S & Another* [2018] ZACC 45; 2019 (1) SACR (429) CC (*Mlungwana*).
2 Regulation of Gatherings Act (RGA) 205 of 1993.
3 RGA s 21(1)(a)
4 Ibid at para 74.
5 Ibid at paras 82–89.
6 Ibid at para 106.
7 Ibid at para 69.
Court has, in fact, focused on the constitutional dilemmas around the regulation of protests and as a result, this article will focus mainly on protests, too.

The facts that gave rise to the *Mlungwana* case underline the expressive importance of protests for poor communities. The SJC seeks to advance constitutional rights, particularly those of informal settlement dwellers. South Africa has a massive formal housing shortage, and the SJC aims to give informal settlement dwellers an organised voice in how government determines and implements development priorities, given the often transitory and peripheral nature of these communities. One method they use to attain an organised voice is to protest. Thus, in 2013, the SJC members and supporters engaged in an act of civil disobedience by chaining themselves to the railings outside the offices of the-then Mayor of the City of Cape Town, Patricia de Lille. Ten people were arrested and later found criminally liable for failing to notify the municipality of the protest. The SJC claimed in heads of argument to have attempted to engage the Mayor for over two years on services for informal settlements, but to no avail. Protests may not be the means of expressing grievances of first resort, with protesters often exhausting more conventional communication channels before taking to the streets, and as is evident from *Mlungwana*, the SJC attempted to do just that, resorting to the protest after they were ignored repeatedly.

There can be little doubt that *Mlungwana* advanced freedom of assembly in South Africa, and the judgment contrasts sharply with an assembly judgment the Court made eight years earlier. The *Garvis* case involved the constitutionality of s 11(2) of the RGA that dealt with liability for damages in the event of gatherings and demonstrations turning violent. Protests are more likely to turn violent than gatherings, as they generally mobilise people around contentious issues, and this case revolved around a trade union protest in the context of a strike that had, in fact, turned violent. *Garvis* affirmed the constitutionality of the civil liability provisions in the Act, finding that organisers of gatherings would be liable for damages caused during gatherings, while providing a very onerous defence including requirements that organisers show they took all reasonable steps to avoid the damage and they did not reasonably foresee the damage. In the majority judgment, the Court found that holding organisers responsible for riot damage without having to prove their negligence, coupled with very tightly drafted defences — which amounted to a form of strict liability — imposes a limitation on the right to freedom of assembly. While this limitation increased the costs of holding assemblies significantly, it was justifiable as it provided victims of riot damage with meaningful redress. The Court argued that the fact that the organisation could transfer the costs of the riot damage onto the responsible individuals, dampened the severity of the limitation somewhat.

Despite claiming to recognise the importance of protests as an expressive vehicle of the poor, *Garvis* is out of touch with the real world of large-scale gatherings, which are by their very nature unpredictable, and characterised by power imbalances between protesters on the one hand, and police and government officials on the other. The judgment betrays a poor

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8 Social Justice Coalition ‘About Us’ (undated), available at https://sjc.org.za/about
10 *South African Transport and Allied Workers Union & Another v Jacqueline Garvis & Others* [2012] ZACC 13, 2013 (1) SA 83 (CC) (‘*Garvis*’).
11 Ibid at para 84.
12 Ibid at para 70.
13 Ibid at para 72.
historical understanding of the circumstances in which protests descend into violent riots.\textsuperscript{14} According to Donatella della Porta, escalating policing is a well-recognised trigger of violent riots, often as spontaneous expressions of outrage.\textsuperscript{15} Organisers can reasonably foresee that riot damage may result if the police become violent; yet short of staying at home, there is little that they can do by way of reasonable steps to prevent it. Another well-recognised trigger is when authorities that are the target of the protest fail to respond, or fail to accept the memorandum: again, that is a trigger that can be reasonably foreseen, but again the only reasonable step to prevent anger brimming over into riot damage would be to cancel the protest. Officials have been known to refuse to accept memoranda to collapse protests.\textsuperscript{16} Even more concerning is the Court’s endorsement of riot damage becoming the responsibility of the organisers, and not the individuals responsible for the riot damage. This requirement transfers the onus for tracking down the perpetrators of the riot damage to the organisers, and not the state. This would require organisers to have access to superior investigatory powers, which are more appropriately within the realm of the state. Furthermore, the definition of riot damage is extremely broad, including damage that occurred even before or after the actual protest.\textsuperscript{17} As the Special Rapporteurs on the Rights to Freedom of Peaceful Assembly and of Association, and the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions on the proper management of assemblies, have argued:

> While organizers should make reasonable efforts to comply with the law and to encourage peaceful conduct of an assembly, organizers should not be held responsible for the unlawful behaviour of others. To do so would violate the principle of individual liability, weaken trust and cooperation between assembly organizers, participants and the authorities, and discourage potential assembly organizers from exercising their rights.\textsuperscript{18}

It is difficult to discern the doctrinal principles underlying Garvis and Mlungwana, but what is clear is that both cases provided very different visions about protests and their purpose in democratic societies. Elements of judicial conservatism, even moral panic about protests, are evident in Garvis, whereas Mlungwana is much more alive to the need to protect assemblies as one of the few expressive vehicles available to poor and marginalised people. This is not to say that Mlungwana represented a complete break with Garvis, though. A flash of conservatism is evident in the Court’s conclusion, which states that ‘[i]n balancing the above factors, it becomes clear that section 12(1)(a) is not “appropriately tailored” to facilitate peaceful protests and prevent disruptive assemblies.’\textsuperscript{19} This statement conflates disruptive and violent protests, in spite of the fact that protests by their very nature are meant to be disruptive, and in any event, the RGA protects disruptive protests, drawing the line at serious disruption.\textsuperscript{20}


\textsuperscript{15} D della Porta Clandestine Political Violence (2013) 32–69.


\textsuperscript{17} RGA s 11(3)


\textsuperscript{19} Mlungwana (note 1 above) at para 101.

\textsuperscript{20} RGA s 5(1).
The judgment also refers to the rising number of violent protests, failing to acknowledge the government and media tendency to overstate violence in protests, and the fact that protests remain overwhelmingly peaceful and orderly (although violent community protests have been on the increase).²¹

The conservatism in Garvis aligns uncomfortably with the Justice, Crime Prevention and Security (JCPS) Cluster’s concerns about protests. The cluster has expressed concern about the growing number of violent protests, to the point of declaring them priority crimes. In doing so, it took the lead from the Medium Term Strategic Framework (MTEF) of 2014–2019, which included ensuring domestic stability as an objective. This objective included the sub-objective of ‘contributing to domestic stability through the successful prosecution of criminal and violent conduct in public protests’.²² The National Prosecuting Authority (NPA) had also identified violent protests as one of the crimes for prioritised prosecution.²³ These shifts in the cluster’s thinking pointed towards the government and state framing violent protests increasingly as national security threats. Clearly, there are sharp differences between the government and civil society about the exercise of this right, and the mixed signals from the Constitutional Court are not helping to clarify matters either.

The Garvis and Mlungwana cases raise the following questions. With specific reference to protests, in which direction is the doctrine around the right to assembly, and consequently the practice of regulating protests, going: the more conservative and truncated direction of Garvis or the more progressive and expansive direction of Mlungwana? The main focus of Mlungwana is on notification requirements for conveners. By using notification as a lens through which to view doctrine on protests, are actual municipal practices on the ground opening or closing spaces for expressive conduct by the poorest and most marginalised in society? Has the Constitutional Court set the government and state on the most appropriate path? Can and should it do more? This article addresses these questions.

II A NOTE ON METHODOLOGY

In order to assess municipal enablers or barriers to exercising the right to protest using the notification procedures, the author analysed documents sourced from various municipalities around the country. Two sets of documents were used for this analysis. The first dataset was collected from twelve municipalities around the country by a team of researchers under the author’s direction. During research visits, which were conducted between 2012 and 2013, the researchers obtained direct access to municipal records, which allowed them to record all gatherings over a five-year period. They recorded the names of the conveners, the dates and purposes of the gatherings and responses of the municipalities. They also collected notification forms and checklists for conveners, interviewed responsible officers and conducted focus groups with protest conveners. The research visits were labour and cost-intensive, but all municipalities approached co-operated. Only one municipality, Cape Town, insisted that the researchers

²³ Personal correspondence with Bulelwa Makeke, Head of Communication, National Prosecuting Authority, 8 February 2019 (on file with author).
put in a request for the information in terms of the Promotion of Access to Information Act 2 of 2000 (PAIA); and the format in which they provided the records was not informative enough to be of much use. Another municipality, Phumelela, kept such poor records that they proved to be unusable. On the whole, though, the information the researchers were able to glean provided a sufficiently comprehensive picture of the regulation of gatherings at municipal level.24

The second dataset was sourced from the South African History Archives (SAHA), which assisted the public interest law clinic, the Legal Resources Centre (LRC), to lodge PAIA requests to all municipalities in the country where an information officer’s contact details could be found. SAHA requested copies of notice of gathering templates in terms of s 3 of the Act; the contact details of all responsible officers; the number of gatherings in the municipal area since 2015; the number of convenors’ meetings; the number of prohibited gatherings and the reasons for the prohibitions; and any training manuals used by these municipalities.25 SAHA’s PAIA requests were largely met with mute refusals. According to the LRC, when responses were received, they were largely inadequate and triggered the need for extensive engagement with these municipalities. Of the 202 requests that were submitted, there were 26 transfers to other government bodies, five outright refusals, 214 deemed refusals, 43 requests granted in part, and a mere three requests granted in full. Of the 12 appeals that were lodged by SAHA, nine were met with mute refusals.26 These statistics painted a bleak picture of municipal non-compliance with — and even contempt for — PAIA. Nevertheless, when municipalities did accede to the requests, they provided information that was useful, revealing and often depressing.

When viewed together, these two datasets provided satisfactory detail about actual Gatherings Act practices on the ground over the past decade. They revealed that many municipalities used similar templates for their notice requirements — suggesting that these templates had been provided by a central source — and while there were some variations in the regulatory practices of their responsible officers, there were also many similarities and shared problems. These datasets were complemented by information and opinions the author sourced from conveners and legal practitioners who specialise in the right to protest, and in this regard, there are two overlapping networks. The first is the Right2Protest working group facilitated by the Right2Know Campaign, which provides a forum for convenors, right to protest advocates and legal practitioners to discuss and strategise around freedom of assembly issues. The second network is the Right2Protest Project, set up by a coalition of civil society organisations that aim to advance the right to protest and freedom of assembly more generally. This project provides legal assistance and support to all protesters, and also produces reports on the state of the right to protest in South Africa.27

IV NOTIFICATION VERSUS PERMISSION-SEEKING

There can be little, if any, doubt that notification of an intention to stage a gathering serves useful public purposes, as acknowledged by Mlungwana. Notification makes it easier for the relevant authorities to facilitate gatherings. It allows them to regulate the time, manner and place of gatherings in ways that satisfy the expressive and associational needs of participants and the safety and mobility needs of the broader public. In fact, notification is meant to

24 Duncan (note 16 above) at 13–20.
25 Personal correspondence with Sherilyn Naidoo, Legal Resources Centre (30 July 2019, on file with author).
26 Ibid.
27 Right2Protest Project ‘Who We Are’ (undated), available at https://www.r2p.org.za/who-we-are/
be a content-neutral process that should not be abused by the government to frustrate or deny gatherings because of their purposes. As gatherings normally obstruct traffic, there are sound reasons for forewarning municipalities to ensure that participants are given rights of way on public streets, while continuing to ensure traffic flow. Furthermore, there may also be competing gatherings at the same time and place, and in such situations, municipalities need to mediate these competing claims. The safety of participants may also need to be ensured through police escort, which would need to be organised in advance. Notification also allows the authorities to weed out those gatherings that are more likely to pose public safety risks, and to enter into negotiations with the conveners to mitigate those risks: to that extent, notification provides a before-the-fact means of preventing violent riots that require after-the-fact interventions to claim damages that was the issue in Garvis.

It would be difficult for a fair-minded person to argue against these abstract justifications for notification; but in the real world, notification is not ideologically neutral. Fears of dissent by the elite have also driven their obsessive need to regulate public spaces. So, it is small wonder that an administrative procedure that should not be burdensome to conveners can be (and has been) used to control gatherings, render them undistruptive and unthreatening, or even prevent them from taking place at all. In an era of growing social polarisation and resistance to austerity, governments around the world are suffering from what the International Centre for Not-for-Profit Law has termed agoraphobia, or fear of assemblies in public places, and this — they claim — is what really underpins their attempts to regulate protests overzealously.

In an extended analysis of the US system — where permits have been required for moving parades or processions, and where their constitutional validity has been upheld since 1941, Edwin Baker argues that not only are permits an unjustifiable limitation on assembly and expression rights, but the objectives the authorities seek to achieve could be achieved through less restrictive voluntary notifications. Permits have been justified by the authorities on the basis that they need to provide adequate policing, ensure the safety of assemblies and regulate traffic flow. Baker argues that, in theory, while permits are meant to regulate the time, manner and place of assemblies in a non-discriminatory fashion, in real-world situations, permits serve to suppress unpopular groups, assuage elite fears about mob rule and routinise public life in censorious ways. In fact, Baker states bluntly, ‘historically, the primary function of mandatory permit requirements was probably their overtly unconstitutional use to harass, control, or suppress expressive activities of unpopular groups’.

Baker points out that permits are based on a doctrinal shift in government thinking in favour of public order and against mass public displays of support or opposition to the issues of the day. That public streets should be dedicated to traffic, rather than being used for multiple purposes, including discussing, or demonstrating about, public questions, pointed to warped government priorities that prioritised transportation functions over expressive functions. He also argues that permit requirements also transfer power from paraders, and particularly dissidents, to government officials. In view of the costs of expressive conduct of the permit system, Baker advocates for a voluntary system as a less restrictive means to achieve the same

29 Ibid.
30 Cox v New Hampshire 312 US 569 (1941)
ends. In a voluntary system, protesters notify the authorities of their intention to assemble in order to obtain the benefits of a forewarned police service, prioritised rights to public spaces and reduced antagonism from the public. A voluntary system would have the added benefit of acting as an incentive to make the permit system convenient, non-intimidating and open (a mandatory system, on the other hand, reduces the pressure on the government to reform its system). Any groups who are intent on causing havoc, would most likely not notify the state in any event.32

It is not necessary under international law for domestic legislation to require advance notice for gatherings, and in any event, in the case of some gatherings, notification serves no legitimate public purpose.33 To this extent, Mlungwana’s endorsement of the practice is not entirely in step with international thinking, as it takes the need for notification for granted, without examining its own premises. Countries like Ireland and some states in Australia do not even require notification: instead the provision of such notification is voluntary. However, giving notice grants participants legal protection they may not otherwise enjoy; for instance, notification makes it less likely that the participants will be charged with offences relating to the obstruction of public roads.34

However, if governments do require prior notification for large public assemblies, then it would be difficult to argue against this requirement. The United Nations Human Rights Committee (UNHRC) has also held that prior notification is a permissible restriction on freedom of assembly in terms of the International Covenant on Civil and Political Rights (ICCPR).35 At the same time, they also recognise the potential for abuse, especially when official procedures turn notification into a de-facto permission-seeking process.36

Concerned about the growing abuses of notification for censorious purposes, various international human rights bodies have, in recent years, developed standards for notification. For instance, the UN Special Rapporteurs on the Rights to Freedom of Peaceful Assembly and of Association and the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions recognised the legitimacy of state authorities putting in place systems for notification, providing they do not mutate into systems of prior authorisation. However, they also warned that notification is not necessary for assemblies that do not require prior preparations by the state, such as those involving a small number of participants or where the impact on the public is likely to be minimal.37 Notification should not be overly bureaucratic and function as a de-facto form of authorisation or as a basis for content regulation.38 The absence of a response should be deemed as official acceptance that the gathering will proceed according to the notice. The authorities are also required to facilitate simultaneous gatherings, including counter-demonstrations.39

The UN Human Rights Committee has also held that contracts with municipalities as well as fines for failure to give notice are undue restrictions. In spite of the fact that these

32 Ibid at 138–160.
35 UN Human Rights Committee, Kivenmaa v Finland (1994).
37 Kiai & Heyns (note 18 above) at 6
38 Ibid at 6.
39 Ibid at 7.
sanctions are less serious than criminalisation, they may still inhibit the freedom of assembly. The Committee has argued that a notification requirement should be limited to a substantial number of participants, or those that will disrupt traffic, and notification procedures should not be overly bureaucratic or onerous. In this regard, they expressed concern about municipalities requiring that there be more than one convener, allowing only registered organisations to stage an assembly, and requiring identity documents and the details of marshals, as well as the exact number of participants. In the Committee’s view, the notice should only contain the date, time, duration and location or itinerary of the protest, and the personal details of the convener (not the marshals). As for the length of the notice period, opinions differ as to the best practice: the OSCE Office for Democratic Institutions and Human Rights (ODIHR) suggests not more than a few days\textsuperscript{40}, while the UN Special Rapporteurs suggest a time period of not more than 48 hours.\textsuperscript{41} Spontaneous protests should not require prior notification at all, and neither should individual protests or protests that start out as individual protests and that attract more people. Static public assemblies or open air public meetings may not even need prior notification as they present the authorities with fewer logistical challenges.\textsuperscript{42} Publishing decisions about notifications should act as a further disincentive for authorities to abuse the process. While they may be tempted to impose sanctions (such as fines) on those who fail to notify, they must weigh up how burdensome the failure to notify has actually been for effective governance. If the breach has been non-material, then the authorities would not be able to justify the imposition of sanctions.\textsuperscript{43}

V REGULATORY PRACTICES OF MUNICIPALITIES

The Act measures up fairly well to some of the standards discussed above, but also falls short in some important respects. In terms of the Act, a convener must give notice of an intended gathering to a local authority, such as a municipality or magistrate if a municipality is not in reach, at least seven days prior to the date of the march, which is a very long period compared to the benchmarks discussed above.\textsuperscript{44} However, depending on the circumstances of the gathering, notice of a gathering may be given in a period of less than seven days provided this is not less than 48 hours and reasons are given for the short notice\textsuperscript{45}; even that exception to the standard seven-day period is long. If notice is given in a period of less than 48 hours, the responsible officer may prohibit the gathering.\textsuperscript{46} Depending on the nature of the gathering, the responsible officer of the municipality may call up a meeting between the three main role players (the municipality, the responsible officer, police, or the authorised member, the convener and the deputy convener) to discuss matters such as the route to be taken by the participants, the number of participants, the number of marshals required, and other logistical matters.\textsuperscript{47} At this meeting (known as the ‘Section Four meeting’ after the section in the RGA that regulates

\textsuperscript{40} Zenn (note 28 above) at 8.
\textsuperscript{41} Ibid.
\textsuperscript{42} OSCE Office for Democratic Institutions and Human Rights (note 33 above) at 148.
\textsuperscript{44} RGA s 3(2)
\textsuperscript{45} Ibid.
\textsuperscript{46} Ibid.
\textsuperscript{47} RGA s 4(2)(b).
this meeting), the police may request that certain conditions be imposed on the gathering. But the RGA requires that the negotiations in Section Four meetings take place in good faith.

The grounds that are recognised by the RGA for lawful prohibitions are as follows: when a responsible officer receives credible information on oath that a proposed gathering will result in serious disruption of pedestrian or vehicular traffic, or that there will be injury to participants or other persons, or that extensive damage to property will occur, and that police will not be able to deal with such threat, then s/he can consult with the convener and police with a view to prohibiting the gathering. Any decision taken or given during the negotiations or conditions imposed on a proposed gathering, including the prohibition of a gathering, may be challenged in a magistrate’s court within 24 hours. When a gathering turns violent, or where there is serious risk of injury to persons or property, then the police may disperse the gathering after having warned it to disperse. The argument that the gathering was spontaneous, rather than premeditated, can be used as a defence against a charge of an illegal gathering, as the RGA contemplates situations where people gather spontaneously in reaction to unforeseen events.

In spite of the fact that the RGA merely requires notification of a local authority for a gathering to take place, in reality many municipalities have turned notification into a permission-seeking exercise. In the wake of Garvis, municipalities have attempted to pre-empt widespread riot damage by placing myriad obstacles in the way of gatherers, especially protesters, showing the real-world effects of the Court’s doctrinal embrace of a more public order-inclined approach towards protests. These practices have become common across municipalities.

A Requiring permission for gatherings

Many of the notification forms that municipalities provide make it clear that convenors are notifying them, not seeking permission. However, during these processes, a permission-seeking mentality creeps in. Correspondence with convenors is often peppered with references to applications for permits or permission being granted. The eThekwini Municipality, for instance, has in a prohibition letter referred to notifications as applications, and prohibitions as the denial of permission, showing that the municipality viewed the notification process as a permission-seeking process. The Makana Municipality makes use of a form that makes it clear that the notification is actually about permission-seeking.

This misperception about notification is shared and perpetuated by the conveners, which reinforces the perceptions of municipalities that this language is acceptable. Notification letters abound in the two datasets in which convenors have asked for permission from municipalities for a gathering. Even a branch of the largest trade union federation in the country, the Congress of South Africa Trade Unions (Cosatu) — which one would expect to know better

48 Ibid s 5(1).
49 Ibid s 6(3)(a).
52 Makana Municipality ‘Application in Terms Regulation of Gathering Act [sic] No. 205 of 1003 to Hold a Gathering or Procession’ (undated).

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given their considerable experience in convening protests — requested ‘permission’ for a march, triggering a response from the Umzimkhulu Municipal Manager that ‘approval is granted’. The South African Communist Party (SACP) applied to the same Municipal Manager for a ‘permit’ to march.

B Onerous conditions for gatherings

There is a persistent trend in which municipalities place onerous conditions on gatherings that are not required by, or arguably even supported by, the RGA. According to the RGA, the responsible officer may impose conditions regarding the conduct of the gathering if agreement has not been reached with the convenors and the police at the Section Four meeting. Yet, municipalities are known to impose conditions even before the Section Four meeting takes place. For instance, in Johannesburg, the Johannesburg Metropolitan Police Department (JMPD) presented the Right2Know Campaign with an invitation letter to attend a Section Four meeting, which required them to provide a list of letters on attendance of the meeting. These letters included a confirmation letter from the intended recipient of the memorandum (if the intention of the protesters was to deliver a memorandum), permission letter from the ward councillor, permission letter for the place of gathering, copies of identity documents for convenors, copies of proof of residential/ work addresses for convenors, and a list of marshals (only their names). These conditions appear to be standard in the City. Convenors are told that if they cannot produce these documents, then they need to provide reasons.

However, this checklist does not form part of the contents of the notice, which may make these requirements difficult to contest if a gathering is prohibited on the grounds of non-compliance. Furthermore, this checklist makes a gathering conditional on the support of the very individual or institution that is being protested against, which is clearly inappropriate and non-compliance should not even need to be motivated. In a 2013 interview, the responsible officer for the City of Johannesburg did indicate that gatherings had been prohibited for failure to provide the confirmation letter from the recipient of the gathering, although on several occasions he had phoned recipients to check if they were willing to accept memoranda and to facilitate the process. Both datasets make it clear that many protests are related to municipal service delivery, and ward committees may be deeply implicated in these problems; so subjecting a protest to the permission of a ward councillor is inappropriate and reasons for failing to do so should not be a requirement.

The Rustenburg Municipality also instituted a requirement that before a gathering could take place, the convenors had to meet a checklist of conditions. The checklist included a permit to use a public road, an authorisation letter for the venue, a permission letter from the tribal council, and an acknowledgement letter from the intended recipient of the memorandum of demands that s/he would be available to receive the memo to be served. According to a record of a Section Four meeting held between the Tswelopele Municipality and the conveners of a

53 Congress of South African Trade Unions Umzimkulu Local ‘Request to March’ (letter to Municipal Manager, 1 November 2016); Office of the Municipal Manager ‘Re: Request to March’ (letter to Congress of South African Trade Unions Umzimkulu Local, 7 November 2016).
55 RGA s 4(4)(c).
56 Duncan (note 16 above) at 82.
57 Rustenburg Local Municipality ‘Checklist for Gatherings’ (undated).
proposed protest by the Economic Freedom Fighters (EFF), the chairperson of the meeting stated that in terms of the RGA, the applicant should have confirmation before the meeting of a person who will receive a memorandum.\textsuperscript{58} This requirement is a misreading of the RGA, which merely requires that information be provided about the place where and the person to whom the memorandum should be handed over.\textsuperscript{59} However, the chairperson insisted on this requirement as a precondition for gatherings, on the pretext that violence could result if there was no-one to accept the memorandum.

It has been common for municipalities to require a list of marshals, although they differed in terms of how much information they require. While Johannesburg required the names of marshals but no further details; the Tswelopele Municipality required conveners to supply names and addresses of marshals; and Polokwane required the cellphone numbers.\textsuperscript{60} The Mbombela Municipality made it clear in its notification form that gatherings would be prohibited unless the conveners supplied a list of marshals.\textsuperscript{61} These conditions place onerous burdens on convenors and are invasive as potential marshals may be reluctant to provide such personal details to a local government, particularly if they are in conflict with it.

The more onerous the requirements, the more likely it is that participants will eschew the RGA process entirely. Records of the troubled Mandeni Municipality (where there have been ongoing protests against the municipality) show that, during the 2015–16 period, most protests labelled ‘service delivery’ and involving the blocking of roads and burning of tyres did not go through the formal process.\textsuperscript{62} In the Mbombela Municipality, in an interview conducted in 2014, the responsible officer said that they had introduced a tighter screening requirement for service delivery protests, where conveners had to prove that they had attempted to resolve the grievance with the mayor’s office or the ward councillor. Failure to do so would result in prohibition. The responsible officer admitted that this additional requirement had resulted in more protests that completely bypassed the RGA processes taking place, as protesters became frustrated with being thrown back onto the very officials they had found wanting in the first place.\textsuperscript{63}

Several municipalities also require the conveners to sign indemnity forms which indemnify the municipalities against damages that may result from the gathering. For instance, the Mbombela and Inkosi Langalibalele Municipality required conveners to sign forms that indemnified those municipalities against any claim for damages suffered by any person as a result of any event taking place during the gathering. The inference behind the forms is that failure to sign would result in ‘permission’ to gather being denied; yet signing is likely to instil fear in convenors as it exposes them to claims that would otherwise be brought against municipalities, and requires them to waive their rights to bring claims against municipalities that engage in wrongful acts.\textsuperscript{64}

\textsuperscript{58} Tswelopele Local Municipality ‘Minutes of a Section 4 Meeting Held on 1 December 2015 at 10.00 in the Board Room Hoopstad Municipal Offices’ (1 December 2015).

\textsuperscript{59} RGA s 3(3)(j).

\textsuperscript{60} Tswelopele Local Municipality ‘Notice of Gatherings: Regulation of Gatherings Act 1993’ (1 September 2015); Polokwane Municipality ‘Submission of Internal Appeal Against Decision Relating to PAIA Request SAH-2016-POL-0001’ (letter to South African History Archives, 14 November 2016).

\textsuperscript{61} Mbombela Municipality ‘Application for an Intended Gathering/Picket’ (undated) 2.


\textsuperscript{63} Duncan (see note 16 above) at 62.

\textsuperscript{64} Personal correspondence with S Malematja, attorney, Right2Protest Project, 14 August 2019 (on file with author).
C  Levying of fees for gatherings

One condition related to gatherings that deserves particular attention involves the payment of fees for the right to gather. In Johannesburg, for instance, conveners are required to pay a ‘planning fee’ of R440.\textsuperscript{65} No further information is provided about what the basis of the fee is, but according to the Right2Protest Project, one convener was told that if the fee was not paid, then the JMPD and the South African Police Service (SAPS) would not provide a police escort for the gathering.\textsuperscript{66} This odious practice of levying policing fees (when policing is already paid for from the fiscus, and therefore leading to public-order policing being paid for twice over) leaves gatherers vulnerable to harassment and even attack if they proceed with their gathering without having paid the fee. This requirement also undermines a fundamental reason for notification, namely to forewarn the police so that they can provide an escort for a gathering.

Johannesburg is not the only municipality that requires the payment of a policing fee. The traffic department of the Emfuleni Municipality has required convenors to pay a policing escort fee, even in respect of protests. In contrast, the Langeberg Municipality made it clear that, for the 2016–2017 period, all events that required traffic escorts would need to pay an escort fee ‘except political demonstrations, marches and picketing.’\textsuperscript{67} In the case of the Ba-Phalaborwa Municipality, a march planned protest by an organisation called the Ba-Phalaborwa Unemployment Community was banned partly because there was no proof that they had paid an application fee.\textsuperscript{68}

D  Regulation of gatherings in ways that are not content-neutral

Ideally, the RGA should regulate gatherings in a content-neutral manner, with the narrowest prohibitions possible on harmful forms of expression. However, the RGA contains a very broad definition of hate speech, in that it prohibits participants from ‘by way of a banner, placard, speech or singing or in any other manner incite hatred of other persons or any group of other persons on account of differences in culture, race, sex, language or religion’.\textsuperscript{69} The RGA also contains an incitement to violence prohibition, which states that ‘no person present at or participating in a gathering or demonstration shall perform any acts or utter any words which are calculated or likely to cause or encourage violence against any person or group of persons’.\textsuperscript{70} These prohibitions are broader than the constitutional definitions of hate speech and incitement of imminent violence\textsuperscript{71}; however, they have not been tested against the Constitution, and if they were to be, they may well be found wanting. The definition of hate speech in the RGA does not include a harms test and the incitement to violence section does not require the violence to be imminent for it to be prohibited.\textsuperscript{72}

\textsuperscript{65} Johannesburg Metropolitan Police Department, ‘Section 4 Meeting Invitation Letter’: Letter to Right2Know (14 November 2018) 1
\textsuperscript{66} B Zasekhaya & S Malematja ‘Protesting in the City of Jo’burg: Pay the Planning Cost or Risk Not Having Protection’ (Unpublished, Right2Protest opinion) (2 August 2019).
\textsuperscript{68} Ba-Phalaborwa Municipality ‘Application for a Strike Action at the Ba-Phalaborwa Municipality’ (letter to the convenor of the Ba-Phalaborwa Unemployment Community, 9 April 2015) 1.
\textsuperscript{69} RGA s 8(5).
\textsuperscript{70} Ibid s 8(5–6).
\textsuperscript{71} Constitution of the Republic of South Africa, 1996, s 16(2)(b), (c).
\textsuperscript{72} Seleane (note 50 above) at 44.
Some municipalities broadened these provisions even further and placed wide-ranging content restrictions on gatherings. For instance, the Kou-Kamma Municipality required convenors to commit to ensuring that no person present in the gathering utters threats of violence ‘[calculated] to cause, encourage or foment feelings of hostility between different groups or sections of the population of the Republic’. The Kou-Kamma Local Municipality ‘Memorandum of Agreement’ (undated) 3.

Fomenting hostility could easily be interpreted as including speech that targets of protests could be offended by, even in cases where the speech may be legitimate criticism. For instance, municipal officials who are targets of criticism for poor service delivery could insist that this provision be invoked as a condition for protests, to shield themselves from criticism.

The George Municipality also has invasive requirements, such as the requirement that convenors have to provide information about whether placards will be displayed in gatherings, and that convenors provide the names and copies of the identity documents of people who are going to give speeches at the gathering, as well as the duration of the speeches. The Senqu Local Municipality also requires convenors to provide details of whether speeches will be made at gatherings, and if so, by whom. These requirements risk chilling the freedom of expression in gatherings as speakers may be unwilling to be identified in advance, out of fear that their speeches may make them targets for harassment or intimidation. The Emfuleni and Ekurhuleni Municipalities require convenors to give descriptions of the placards and slogans to be displayed, suggesting that these conditions originate from a template that has been circulated to some municipalities.

E Overuse of Section Four meetings

The datasets revealed that municipalities held Section Four meetings for most gatherings they were notified about. This is in spite of the fact that in terms of the RGA, Section Four meetings are needed only if the responsible officer has concerns about the gathering. However, it is clear from the datasets that these meetings have become routine, which is hardly surprising as they provide municipalities with opportunities to impose conditions beyond the requirements of the RGA. Conveners have often complained about these meetings not being conducted in good faith, with responsible officers and authorised members dictating terms rather negotiating. For instance, over a two-year period (2015–2016), the Steve Tshwete Municipality received 56 notices, held Section Four meetings in relation to all of them, and prohibited one. All the others were approved with conditions attached. These statistics are fairly typical of municipal screening processes, which strongly suggest the overuse of the Section Four meeting mechanism and a reluctance to accept notification alone as sufficient grounds for gatherings.

73 Kou-Kamma Local Municipality ‘Memorandum of Agreement’ (undated) 3.
75 Senqu Municipality ‘Notice of Gathering 17/3/1/5/1’ (undated) 2
77 Steve Tshwete Local Municipality ‘Records to the Regulation of Gatherings Act 205 of 1993’ (undated).
F Prohibitions on gatherings on grounds that are not recognised by the Act

What is noteworthy from the two datasets (which, of course, is welcome) is that outright prohibitions of gatherings are rare. However, the gatherings that came to the attention of municipalities without formal notification were routinely prohibited.78 Between 2015 and 2016, the Setsoto Municipality prohibited gatherings when the organisers had not notified the municipality beforehand on the basis of ‘procedures not being followed’; but, on the other hand, the municipality ‘authorised’ all the gatherings for which the convenors had duly provided notification.79 The Polokwane Municipality did not prohibit any gatherings. Records of the Molemole Municipality revealed that they prohibited two protests in 2015. A proposed gathering by the Botlowka Activist Forum was prohibited in order to ‘avoid unnecessary red tape for the community’, and a proposed EFF march was prohibited on the basis that the issues had to be referred to ‘a consultative meeting with SAPS, Botlokwa’.80

In the last days of the Jacob Zuma presidency, the JMPD prohibited a proposed ‘Zuma must fall’ gathering to be held by a coalition of organisations called Unite Against Corruption, on the basis that the responsible officer had not been notified in the required time frame, and on the basis that ‘the gathering (would) result in serious disruption of vehicular or pedestrian traffic, as the indicated number of participants (2000) could not be accommodated on top of the Mandela Bridge in Braamfontein due to safety reasons’.81 Yet, as the convenor pointed out at the time, the Mandela Bridge had accommodated much larger crowds during sporting events, and safety had not been used as a pretext to prohibit those events.82 Inadequate or even no reasons are sometimes given for a prohibition, a case in point being another ‘Zuma must fall’ protest planned to be taken to the Union Buildings, which is the seat of government, in Tshwane in April 2017. The Tshwane Metropolitan Police Department (TMPD) prohibited the march, stating that ‘due to non-compliance, note that your march for 7 April 2017 will be illegal and a case docket will be opened’. The TMPD failed to provide any details about the basis for the allegation of non-compliance, and the prohibition was challenged successfully by the organisers.83

In both datasets where prohibitions were recorded, there was no evidence whatsoever of credible information having been provided on oath that the gathering was likely to result in violence, and that no alternatives short of prohibition were possible (as required by the RGA). As laudable (and underutilised) as this requirement is, the RGA contains no provision for a counter-affidavit from conveners, which makes the process inherently one-sided and opens it up to abuse by the police who can make unsubstantiated allegations to ensure the prohibition

78 Duncan (note 16 above) at 164–165.
79 TP Masejane ‘Request for Information Relating to Gatherings within Setsoto Municipality’ (letter to South African History Archives, January 2017)
81 Correspondence between JMPD and convener, Unite Against Corruption, Mark Heywood ‘Prohibition of the Gathering in Terms of s 3(2) of the Regulation of Gatherings Act 1993 (“the Act”)’ (15 December 2015, on file with author).
82 Correspondence between convener and JMPD, City of Joburg Mandela Bridge (14 December 2015, on file with author).
83 HM Mohale ‘Application for National Coalition Against State Capture: March from Church Square to Union Buildings is Prohibited’ (correspondence between responsible officer HM Mohale, TMPD, and convener Mark Heywood, 6 April 2017).
of a gathering. One such case occurred in 2004 when the Thembelihle Crisis Committee attempted to hold a march in November 2004 and they agreed to abide by the conditions of the RGA. However, the responsible officer allegedly refused to listen, and said that he would deny permission for the march ‘because of Thembelihle’s history’, and ‘because of that once uncontrollable behaviour of the Thembelihle community blockading streets’. The JMPD then produced an affidavit to that effect, which they then used as a reason to prohibit the march. However, according to the convenor, S’phiwe Segodi, the version of events given in the affidavit was not accurate, as violence ensued after the community defended itself against unlawful evictions by private security guards. Such an abuse of process would not be possible if the RGA made provision for a counter-affidavit.

Municipalities are also known to impose blanket prohibitions on gatherings during special events, effectively suspending the right to gather in public spaces. In March 2010, shortly before South Africa’s hosting of the 2010 World Cup, and after protests in Orange Farm, Sebokeng and Sharpeville, the Concerned Residents of Sharpeville notified the Emfuleni Local Municipality of their intention to march on 12 March 2010. In response, the Chief of Traffic and Security responded: ‘The MEC for Gauteng Community Safety has instructed that no permission for marches in Gauteng should be granted until further notice. This instruction is given by the MEC due to the volatile situation in the townships’. Then in April, a march planned by the Public and Allied Workers Union of South Africa in Vanderbijlpark for 5 May was banned on the pretext that it was too close in time to the World Cup (South Africa hosted the World Cup from 11 June to 11 July 2010). The prohibition took place in response to a directive sent on 29 April by the Sebokeng Cluster of the SAPS to the station commanders of all police stations in the Cluster, which read as follows: ‘By the directive of the Sebokeng Cluster, Major General DS de Lange you are hereby informed that no authorisation must be given for marches until the end of the World Cup 2010’. This directive was issued in spite of the fact that the RGA makes no provision for the SAPS to usurp decision-making powers of local authorities around gatherings. More recently, when the Congo Peace Without Borders notified the TMPD about their intention to stage a protest in the capital city on 29 July 2016 (the year of the local government elections), they were told ‘Please note all Act 205 gatherings are on hold until local elections are done. All gatherings will resume on 15 August 2016’.

VI NOTIFICATION IN THE WAKE OF THE CONSTITUTIONAL COURT JUDGMENT

As should be apparent from the above, there are a myriad problems surrounding the notification process that remain to be addressed. Yet, in Mlungwana, the Minister of Police argued that ‘the giving of notice imposes modest requirements on the person(s) convening a gathering’.  

84 S Segodi ‘Affidavit of Sphiwe Sevright Segodi, Bhayi-Bhayi Miya & the Thembelihle Crisis Committee v The City of Johannesburg & the Minister of Safety & Security’ (5 November 2004) 6
85 Correspondence between MT Mollo, Chief Traffic and Security, Emfuleni Local Municipality and H Mosesi, concerned resident of Sharpeville’ (11 March 2010).
86 Correspondence between Major General DS de Lange and Station Commanders of Vanderbijlpark/Sebokeng/ Evaton/Orange Farm/Ennerdale/Sharpeville/Boipatong/Barrage Sebokeng Cluster ‘Authorisation of Marches till End of World Cup’ (29 April 2010).
87 Correspondence between Hilda Mohale of the Tshwane Metropolitan Municipality and Kelly Kropman of the Legal Resources Centre (21 July 2019).
88 Mlungwana (note 1 above) at para 3.
In reality, though, the notice requirement triggers an explosion of bureaucracy that is anything but modest. As the Right2Protest Project has noted, the safety of participants in a gathering is at the heart of the RGA, therefore it is absurd for the state to take advantage of the notice procedure to impose their own arbitrary conditions or bylaws. The Minister argued further that the purposes of notification were to ensure proper planning for a gathering so that they occur in an orderly manner, with minimal disruption where any risk of violence is mitigated to the greatest extent possible. The inference that can be drawn from his arguments is that the removal of criminal sanction on the failure to notify would lead to chaos, as there would be no compulsion for convenors to give notice.

However, there is little evidence of actual notification practices having changed on the ground, though, and the compliance culture that existed before the Constitutional Court judgment remains largely intact. In any event, failure to give notice may not necessarily lead to the police using force to disperse protesters. According to the JMPD’s Wayne Minnaar, if conveners fail to give notice, then the protest will be deemed an unprotected one, and the JMPD will ‘apply discretion when monitoring it, in terms of traffic management and as far safety of the general public is concerned’. Yet, in an environment where weaknesses in public order policing remain, and the threat of police violence against protesters remains ever-present, conveners may be unwilling to take the risk. In any event, despite the many ways in which municipalities have delegitimised the notification process by manipulating it to their advantage, activists who defend the right to protest still recognise the utility of notifying the authorities, and still encourage convenors to do so. As Right2Know’s Thami Nkosi has noted, notification remains ‘security’ from harassment by law enforcement, and in view of inadequate reforms to public order policing, obtaining that security still remains important for protesters.

As flawed as it is, notification procedures lock municipalities and the police into a structured process with conveners, and for those who know their rights in terms of the RGA, they can insist on genuine negotiations, force the state to observe the law, and name and shame them if they do not. However, protest cultures also need to change to ensure that conveners are not inadvertently contributing to the widespread view that notification amounts to permission-seeking, which will perpetuate a compliance culture where the state maintains the upper hand. Furthermore, notification can be used by protesters to protect themselves against violent acts, whether at the hands of the state or other protesters. According to activist and writer Dale McKinley:

…I think that a notification process makes sense only if the police themselves understand and apply the full letter of the relevant law(s) and see protests as the exercising of democratic rights as opposed to threats to ‘law and order’, the ruling party, the state etcetera. — such that the entire process (including things such as the Section Four meeting), is simply an administrative/practical process, not a politicised and manipulative one as is presently the case in most circumstances. It makes practical and legal sense for there to be a notification process, otherwise some will do

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90 Mlungwana (note 1 above) at para 10.
91 Personal correspondence with Wayne Minnaar, JMPD (23 July 2019).
92 Personal correspondence with Thami Nkosi, interim Secrecy and Securitisation Coordinator, Right2Know Campaign (24 July 2019, on file with author).
93 Personal correspondence with Murray Hunter, researcher, Media Policy and Democracy Project (26 July 2019, on file with author).
whatever they please (including unprovoked violence, theft, wilful destruction, attacking others etc.) and thus undermine the right to protest/gather itself … and especially for the majority. If citizens are going to demand and exercise the right then they must also accept that they must do so (unless there is a revolutionary/extraordinary situation) with the requisite political, moral and legal responsibilities.94

In the wake of the Constitutional Court judgment in Mlungwana, the government has not provided guidance on what procedures it intends to put in place as alternatives to criminalisation. In arguments during the case95, the applicants and the amici curiae put forward various alternatives to incentivise the giving of notice, including assuring convenors that the police cannot restrict the protest, as well as avoiding any other criminal charges — including civil liability for damages — as a result of a failure to take reasonable steps to prevent damage (including giving notice), administrative fines or amending the definition of gathering such that notice is only required when police presence will be necessary. In the absence of a public debate about reasonable alternatives and national government guidance, there is a very real danger that municipalities and the police will intensify their now well-established practices of arbitrary rule-making.

In any event, according to the National Prosecuting Authority (NPA), there have been hardly any prosecutions under the RGA (the SJC10 case being an exception).96 Rather, the police prefer to pursue protesters through the criminal justice system on more nebulous, often ill-conceived grounds: in the words of one Moutse-based activist and serial convener of protests, the police have learnt to ‘punish before they prosecute’.97 According to the Right2Protest Project, most of the cases they provided advice on involved public violence charges, followed by damage to property and contempt of interdicts. Right2Protest has noted a tendency of the police to target conveners as the most visible participants in protests, keeping them in jail for as long as possible, and changing charges depending on which ones had the greatest prospects of success. According to the Socio-economic Rights Institute’s (SERI) Nomzamo Zondo, of the 40 protest-related cases the Institute has handled since 2014, only one of those led to a successful conviction. If protesters were legally represented, they were more likely to be released, and those who lacked representation were more likely to plead guilty.98

Both the Right2Protest Project and SERI observed that when the police disperse protests forcefully, they tend to arrest those fleeing the protest, whether or not there is evidence of them being involved in violence or damage to property. In one 2015 case, after a #feesmustfall march of university students to the Union Buildings the police arrested seven people (six students and an informal trader, who happened to be on the scene at the time) as the protest dispersed. After making representations to the Chief Prosecutor, they were released, but not before the police had taken 20 hours to charge them, and initially the prosecutor had refused them bail.99 In other words, much more will need to change if the right to protest is to be protected from arbitrary and unjustifiable criminalisation. The Constitutional Court attacked the most visible manifestation of criminalisation, but the authorities have become adept at criminalising

94 Personal correspondence with Dale McKinley (25 July 2019, on file with author).
95 Mlungwana (note 1 above) at para 96.
96 Personal correspondence with Bulelwa Makeke, Head of Communication, NPA (8 February 2019).
97 Interview with Seun Mogotji (15 October 2010).
98 Interview with Nomzamo Zondo (25 February 2019).
the right in less visible ways that are much more pernicious as they are more widespread and difficult to pin down.

Possibly the most significant contribution to increasing the protection for peaceful and unarmed protests is reducing the potential for police violence against gatherings. Much turns on efforts to reform public order policing in the wake of the Farlam Commission of Enquiry into the massacre and associated killings at the Lonmin platinum mine in Marikana in 2012. The Farlam Commission found that police militarisation was a significant contributor to the problem, and recommended the establishment of an expert panel on public order policing. Sadly, in spite of the fact that the panel has completed its work, the Minister of Police has failed to release their report; so there is no inkling of what reforms have been proposed to address the problem, which suggests that the police are dragging their feet on reforms. At the same time, there are also signs of policing having deteriorated since the Marikana massacre, with cases of alleged police misconduct not being investigated adequately, although there has been a decline since the massacre in the number of people killed in public order situations. Yet, over a period of a decade, there had been a massive increase in the number and costs of civil claims against the police. While the public order police have resorted to using less lethal crowd control weapons in response to the public outcry about deployment of lethal weapons in crowd control situations, there is considerable controversy about how non-lethal many of these weapons actually are, given the serious injuries they can inflict. In view of these problems, it does not appear that meaningful reforms to public order policing are on the horizon any time soon.¹⁰⁰

VII THE ACT AND ITS APPLICATION: POSSIBLE WAYS FORWARD

Undoubtedly, the Constitutional Court judgment in the SJC10 case has lowered the cost of people engaging in peaceful and unarmed gatherings, including (and perhaps especially) protests, but it is likely that the government will continue to limit the right to protest in even more significant ways. If the gains of the SJC10 case are to be meaningful, then there needs to be a commitment from government to shift from coercing convenors into notifying municipalities, to incentivising notification. In other words, in the wake of the SJC10 judgment, the government has a responsibility to lower the costs for peaceful and unarmed protests even more, thereby rebuilding the legitimacy of the notification process. In the absence of such efforts, the government has no basis for insisting on notification as a requirement for gatherings: in this regard, it is regrettable that Mlungwana did not entertain the possibility of notification not being a requirement, and under what circumstances notification may be undesirable, instead taking this practice for granted. As stated already, there is recognition in important pockets of civil society that notification is important; if conveners were to reject notification, then there could be even more injuries or deaths at the hands of the police. But this shift towards a more incentivised approach is unlikely to happen if the fundamental problem of municipalities being made to preside over protests about their own performance — and with practically no functional oversight — remains unaddressed. To this end, the Department of Cooperative Governance and Traditional Affairs should provide political leadership by drafting a memorandum clarifying the responsibilities of local government to facilitate gatherings and

the limits of their powers. The Department should also withdraw from circulation all notices and checklists that conflict with the RGA and the Constitution, and circulate a standardised and compliant alternative. A political intervention of this nature may make legal challenges to arbitrary municipal decision-making less necessary.

While it will be difficult to remove the regulatory responsibilities of municipalities and assign them elsewhere, practical ways need to be found to reduce the implicit conflicts of interest in municipalities acting as the arbiters of protests that may cast them in a bad light. Again, the Department should provide guidance and identify principles in this regard, before the matter escalates to the Constitutional Court. Preferably, the role of responsible officers should not be assigned to a local government official who has a vested interest in protecting the municipality from criticism, and who is somewhat removed from the day-to-day service delivery functions of the municipality. Currently, different municipal and law enforcement officials are assigned particular roles, and each option has its advantages and disadvantages. In many municipalities, the head of traffic and protection services is designated the responsible officer. While this may remove decision-making from the hurly-burly of municipal politics, these responsible officers are likely to bring traffic management and policing biases to their decision-making, prioritising the passage of pedestrian and vehicular traffic over the claims to public spaces by gatherings. In this regard, the metropolitan police departments of the larger municipalities have become notorious amongst civil society organisations working on right to protest issues for placing some of the most restrictive conditions on gatherings, some of which are highlighted in this article. Municipal police are, at the end of the day, still police, and it is not ideal for notification systems to be administered by the police; rather, the system should be managed by civil authorities, as the police will most likely approach notification from a ‘law and order’ mindset, which primarily frames protests as potential security threats.

In smaller municipalities such as Makana, Swartland, and Thaba Chweu, the municipal manager is designated the responsible officer. In the case of the Mandeni Municipality, the Manager: Public Safety recommends ‘approvals’, with the Municipal Manager making the final decision. In these situations, conflicts of interest may well arise, as the person making the final decision about notices is the person who is ultimately responsible for municipal performance. In other municipalities, the Director of Corporate Services acts as the responsible officer. While the administrative arm of different municipalities should be functionally separate from the political arm for reasons of sound governance — which may insulate decisions about gatherings from overt political interference — administrative officials could still be sensitive to criticism as their livelihoods depend on the performance of their municipalities.

In other smaller municipalities, SAPS members are designated responsible officers, which removes decision-making from the municipalities, but can lead to a collapsing of the triumvirate arrangement between convener, responsible officer and authorised member, as the responsible officer is, to all intents and purposes, the authorised member. In the case of the Senqu municipality, different responsible officers were assigned to each gathering they were


102 Makana Municipality ‘Application in Terms of the Regulation of Gathering Act [sic] No. 205 of 1993 to Hold a Gathering and/or Procession’ (undated); Swartland Municipality ‘SAHA’s PAIA Request: Records Related to the Regulation of Gatherings Act’ (3 November 2016); Thaba Chweu Local Municipality ‘Request for Information in Terms of PAIA’ (20 September 2016).
notified of, depending on the locality where the gathering was meant to take place. Members of the Public Order Policing Unit and SAPS in different police stations acted as responsible officers at different points in time.\footnote{Senqu Local Municipality 'List of Gatherings' (undated).} Difficulties in achieving consistent decision-making would be an obvious problem with this approach, as no single responsible officer can be held to account for decisions. At the same time, municipalities spread over large distances face practical problems in administering the RGA, as travelling to Section Four meetings may prove to be difficult. Most municipalities that responded to the SAHA information requests failed to provide further information about the training manuals they relied on, which suggested a lack of consistency in training, and which increases the potential for arbitrary decision-making.

In a series of workshops organised by the Right2Know Campaign to brainstorm ways of troubleshooting problems with the RGA process, participants (including many with considerable experience with gatherings, both as conveners and participants) suggested setting up an ombudsman who would keep the notification process under review, and handle complaints about decisions taken by municipalities. Relying on the courts only to review municipal decisions is problematic for conveners who may lack access to legal services, and furthermore, prohibitions that have been taken on review risk being rejected by courts on the basis that they are not urgent: yet at the same time, the RGA requires a review of unreasonable conditions or prohibitions to be sought within 24 hours. This conundrum has thwarted several legal attempts to take municipalities on review. An ombudsman may offer a more accessible process. They also recommended that local committees consisting of civil society monitors be set up to observe Section Four meetings and ensure greater transparency in negotiations. Another option suggested was to involve the South African Human Rights Commission in greater oversight, as they have offices around the country.\footnote{J Duncan & M Hunter 'Notes from Right2Know Protest Workshops Held by the Right2Know Campaign', unpublished report to Open Society Foundation on the Freedom of Assembly Documentation Project, 30 October 2014.} Municipalities should be required to publish annual statistics around gatherings notices received, gatherings held, those prohibited and the reasons why.

Additional changes to the RGA will be important, and it is better for the government to address them before these, too, are escalated to the Constitutional Court as unjustifiable limitations on the freedom of assembly. For instance, adjusting the definition of gathering in the RGA may be important to roll-back the tendency to overregulate gatherings. Some countries only start to regulate large gatherings when they threaten to disrupt public life to significant degrees. In the case of Hong Kong, for instance, gatherings smaller than 50 people do not have to be regulated. Others require notification only if there is a need for police escorts or if the assemblies are moving. The notification period of seven days is also excessively long and should be reconsidered, including the late notification period of 48 hours. In this regard, a four-day notice period for large assemblies where a certain degree of disruption is anticipated, and a 24 hour notice period in the case of urgent assemblies could be more reasonable.\footnote{Zenn (note 28 above).}

VIII CONCLUSION

More open political systems typically facilitate rather than repress gatherings, as the principle of open government recognises the value of providing channels for the expression of grievances.
However, governments may have a less noble intention for institutionalising collective action, namely to enable them to keep under surveillance those who are taking to the streets, and to channel their demands towards more predictable outcomes.\(^{106}\) While protesters themselves may recognise the value of engaging in more institutionalised forms of dissent, some may also experience the negotiated management of protests as co-forming state power. This difficulty can discourage protests of a more anti-systemic nature, and such protesters are more likely to protest outside the formal channels entirely. This is especially so if the government uses the formal process to produce pacified, unthreatening and undisruptive protests that they can simply ignore.\(^{107}\) Protesters in South Africa face these dilemmas. If they invoke the formal procedures of the RGA that are administered by the very institutions they may be in conflict with, they risk having their voices neutralised. If they do not make use of the RGA, they risk becoming targets of state violence.

Given that protesters are rarely prosecuted in terms of the RGA, the Constitutional Court judgment is unlikely to change the existing problems with the way in which the state regulates and polices gatherings. On the contrary, the SJC10’s success may well drive the state towards using even more pre-emptive restrictions on gatherings and nebulous, ill-framed charges that are more difficult to challenge. That is why the courts need to pay more attention to the conditions for assemblies as constitutional issues, and not just as administrative or procedural issues. Municipal overregulation of gatherings, especially protests, coupled with over-policing, suggests a doctrinal shift in how gatherings are viewed by the state, and one that aligns more with Garvis than Mlungwana. Yet, as argued, Mlungwana is unlikely to arrest this shift. This shift is not confined to South Africa; rather it reflects a more conflictual global social order, declining respect for democracy as a political form, and consequently increasingly common framings of protests as riots and protesters as mobs. South African politics remain firmly on a centre-left axis, and key social justice principles are still deeply embedded in society, although more parties at the margins of the political centre, left and right, are gaining ground. The country is not at an imminent threat of a populist government taking over, which may threaten basic democratic rights and freedoms, including the freedom of assembly.

However, with the growing shift towards right-wing populist politics elsewhere, it cannot be assumed that the country’s political character will remain unchanged. In this regard, it is important to take note of a recent development involving the Freedom Front Plus (FF+), which absorbed many of the more conservative supporters of the Democratic Alliance (DA), as the party’s politics have become increasingly centrist and more inchoate. Reflecting a more conservative turn in thinking about protests, the FF+ introduced a private members Bill seeking to prohibit protests within 500 metres of schools and early childhood development centres.\(^{108}\) Had this Bill found favour with Parliament, children would have been denied the right to protest. While the Bill failed to gain traction, it is an indication that should there be a shift to the right in South Africa’s politics, then government tolerance of protests may decline even further.

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South Africa has a growing problem with disruptive and violent protests: however, the extent to which this is so, is often overstated by the government.\footnote{Alexander et al (note 21 above).} This overstatement allows the government to securitise responses to protests, and provides more evidence of the doctrinal shift referred to above. Instead of recognising protest as a democratic right and legitimate form of expression, increasingly protests have been framed as threats to domestic stability and, consequently, national security. This doctrinal shift has provided the framework for municipal overreach around gatherings and over-policing of public order situations. However, despite the government having declared violent protests a priority crime, the SAPS and the NPA have little to show for their efforts, as they have largely failed to raise their targets for successful convictions in these cases. Some of the grand acts of public violence remain unsolved, despite the SAPS’s commitment to a targeted, intelligence-led approach. Some of the most serious acts of public violence of recent times remain unsolved, the most memorable being the burning down of 29 schools during protests in Vuwani. Despite 132 cases being opened against accused between 2016 and 2017, and despite the State Security Agency (on its own admission) having been forewarned of the potential for violence, at the time of writing, not one had led to a successful conviction.\footnote{South African Police Service ‘Briefing and Status Report on Vuwani: Portfolio Committee on Basic Education’ (Powerpoint presentation, 10 October 2019), available at http://pmg-assets.s3-website-eu-west-1.amazonaws.com/171010SAPS.pdf; N Shazi ‘David Mahlobo Clarifies Vuwani Comments. We’re Still Not Sure What it Means for State Security’, Huffington Post (5 July 2017), available at https://www.huffingtonpost.co.za/2017/07/05/david-mahlobo-clarifies-vuwani-comments-to-huffpost-were-still_a_23016707} Many of the prioritised prosecutions and convictions that took place as a result of the student \#feesmustfall protests during 2015–2016 could hardly be described as serious at all, which was apparent from the fact that the NPA was open to alternatives to incarceration.\footnote{National Prosecuting Authority Annual Report 2016/17, available at https://www.npa.gov.za/sites/default/files/annual-reports/NDPP-Annual%20Report-2016-17.pdf; National Prosecuting Authority Annual Report: 2017/18, available at https://www.npa.gov.za/sites/default/files/annual-reports/NDPP%20Annual%20Report-%202017-18.pdf}

The SJC10 judgment was an important step towards reforming a regulatory process for gatherings that has become increasingly problematic over the years: a process that has alienated more protesters and exacerbated state-society conflict. But, unless the judgment is followed by a deeper and more consistent ideological and doctrinal commitment to respecting the right to protest and ensuring a more genuine incorporation of the masses into the political system — including by the Constitutional Court itself — then the changes are likely to be limited.
What’s So Wrong with Quotas? An Argument for the Permissibility of Quotas under s 9(2) of the South African Constitution

NOMFUNDO RAMALEKANA

ABSTRACT: While s 15(3) of the Employment Equity Act expressly prohibits the use of quotas as affirmative action measures, it is not clear whether quotas fall outside the scope of permissible affirmative action measures under s 9(2) of the Constitution. In the 2015 High Court judgment, South African Restructuring and Insolvency Practitioners Association v Minister of Justice and Constitutional Development & Others (‘SARIPA’), the court found that quotas violate the rights to equality and dignity and are thus impermissible under s 9(2). In 2016, the Supreme Court of Appeal affirmed the High Court’s judgment, reasoning that quotas were arbitrary and amounted to caprice and naked preference. When the matter reached the Constitutional Court, Jafta J’s majority failed to engage with this question. In contrast, in his dissenting opinion, Madlanga J showed some scepticism towards the lower courts’ approach to quotas but did not make a definitive finding. Sharing the scepticism in Madlanga J’s dissent, this article argues that while absolute barriers to the advancement of non-beneficiaries may violate the right to dignity and fall outside the scope of s 9(2), quotas, however rigid, do not necessarily have this impact. The article argues that the lower courts’ findings in this case and, in particular, their extension of the prohibition of quotas to include a prohibition under s 9(2) of the Constitution, are erroneous for three reasons. First, they are based on a much higher standard of review for affirmative action than that envisaged under the Van Heerden test. Second, the courts do not distinguish between quotas and absolute barriers. Third, they are premised on a misunderstanding of the nature of the dignity harm that we are concerned with in the review of affirmative action measures. Ultimately, the article argues that an absolute prohibition of quotas under s 9(2) of the Constitution would have the impact of entrenching patterns of disadvantage, contrary to South Africa’s commitment to substantive equality.

KEYWORDS: affirmative action, dignity, quotas, substantive equality

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I INTRODUCTION

Twenty-six years into its constitutional democracy, South Africa is still grappling with eliminating deeply entrenched, systemic and structural inequality. This inequality is primarily rooted in our history of colonial and apartheid racial, gender and other forms of domination and oppression. It is also rooted in the failures of the early policies implemented to redress inequality;¹ global economic forces that have seen an increase in inequality across the globe;² and the chronic corruption and maladministration by the democratic governments since 1994.³ While the legitimacy of the Constitution⁴ and the commitment to transforming South African society and redressing past injustice is deeply contested,⁵ the Constitution provides several tools to help eliminate this inequality. This includes a justiciable Bill of Rights and the express provision for positive redistributive measures under s 9(2) of the Constitution. This article focuses on the latter, in particular, on the form that positive redistributive measures can legitimately take without violating the rights of those adversely affected thereby.

Section 9(2) of the Constitution empowers the state to take positive redistributive measures, including affirmative action, ‘to protect or advance persons, or categories of persons, disadvantaged by unfair discrimination’.⁶ In its first affirmative action decision, Van Heerden, the Constitutional Court held that the South African equality right, including s 9(2), heralds the ‘start of a credible and abiding process of reparation for past exclusion, dispossession, dispossessing,

² T Pickety, Capital and Ideology (2019).
³ As Ngcobo CJ has noted, ‘Corruption has become a scourge in our country and it poses a real danger to our developing democracy. It undermines the ability of the government to meet its commitment to fight poverty and to deliver on other social and economic rights guaranteed in our Bill of Rights’, Glenister v President of the Republic of South Africa & Others [2011] ZACC 6, 2011 (3) SA 347 (CC) at para 57.
⁴ Constitution of the Republic of South Africa, 1996 (‘Constitution’).
⁶ In this article, affirmative action refers to laws, policies and other measures which seek to realise the right to equality for disadvantaged groups by, amongst other measures, giving them preference or benefits over other groups or to the exclusion of other groups in the context of the allocation of resources such as employment, education or other valued resources. This definition is derived from R Kennedy For Discrimination: Race, Affirmative Action, and the Law (2013) 19–21. It is broad enough to include a wide range of affirmative action measures under s 9(2) of the Constitution as well as affirmative action under the Employment Equity Act 55 of 1998 (‘EEA’). Section 15(1) of the EEA defines affirmative action as ‘measures designed to ensure that suitably qualified people from designated groups have equal employment opportunities and are equitably represented in all occupational levels in the workforce of a designated employer.'
and indignity’. Thus, according to the Court, the equality right ‘embraces for good reason a substantive conception of equality inclusive of measures to redress existing inequality’.

However, there are different forms that affirmative action measures can take — the use of quotas being the most controversial. Most people are familiar with the US Supreme Court’s hard-line on the impermissibility of racial quotas under the Fourteenth Amendment. They would thus be surprised to find that India, the oldest and likely the largest affirmative action regime in the world, primarily uses quotas to redress the injustice of caste-based discrimination in higher education admissions and public employment. In South Africa, s 9(2) of the Constitution does not prescribe whether the use of quotas is permissible thereunder. In Van Heerden, the Constitutional Court set down the standard that affirmative action measures would have to meet to pass constitutional muster — the Van Heerden test. Accordingly, the permissibility of quotas under s 9(2) hinges on whether they can pass this test. The Van Heerden test requires that an affirmative action measure must: target persons who have been disadvantaged by unfair discrimination; be designed to advance and protect such persons; and promote the achievement of equality.

The Van Heerden test is considerably vague and has not been consistently applied by the South African courts. What is clear about the test is that it was designed to protect s 9(2) measures from the higher standard of review applicable to unfair discrimination claims under

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8 Ibid at para 31.
9 Richmond v JA Croson Co 488 US 469 1989 at 507 (O’Connor J invalidated a 30 per cent set-aside/quota for business owned by racial minorities in federal construction contracts for amounting to, inter alia, a form of ‘outright racial balancing’). See also University of California Regents v Bakke 438 US 265 1978 (‘Bakke’) at 307 (The case concerned the constitutionality of a racial quota of 16 out of 100 for admission into medical school, rejecting the policy as a violation of the Fourteenth Amendment, Powell J, inter alia, held that, ‘If petitioner’s purpose is to assure within its student body some specified percentage of a particular group merely because of its race or ethnic origin, such a preferential purpose must be rejected ... as facially invalid’). See also, Fisher v University of Texas at Austin 2016 136 Ct 2198, 2225 (Kennedy J summarises the US Supreme Court’s position on quotas).
11 Van Heerden (note 7 above) at para 37.
s 9(3) of the Constitution,\(^\text{13}\) the *Harksen* test.\(^\text{14}\) Thus, the *Van Heerden* test embodies a relatively more deferent standard of review for affirmative action measures, giving flexibility and scope in the design and implementation of these measures. In his majority judgment in *Van Heerden*, Moseneke J specifically held that the judiciary should not ‘second guess the legislature and the executive concerning the appropriate measures to overcome the effect of unfair discrimination’.\(^\text{15}\) However, prior to the *SARIPA* CC case,\(^\text{16}\) the Court had not had an opportunity to consider whether quotas could pass the relatively deferent threshold set in *Van Heerden*.

In contrast with the lack of clarity on the permissibility of quotas under s 9(2) of the Constitution, the EEA, which was enacted to give effect to the right to equality in the employment context,\(^\text{17}\) permits the use of numerical targets but expressly prohibits quotas in affirmative action measures taken thereunder.\(^\text{18}\) However, it does not define quotas or provide any guidelines to help distinguish numerical targets from quotas, leaving the task to the courts.

In its second affirmative action decision, *Barnard*, the Court, in *obiter*, opined that under the EEA, the difference between permissible numerical targets and prohibited quotas lied in the flexibility of the former. According to the Court, ‘Quotas amount to job reservation’ while numerical targets, ‘serve as a flexible employment guideline’.\(^\text{19}\) The flexibility threshold was affirmed in the Court’s third affirmative action decision, *Correctional Services*.\(^\text{20}\) However, the majority and concurring judgments in that case disagreed on the requisite standard for determining the flexibility of numerical targets. Writing for the majority, Zondo J took an approach that required numerical targets to allow for deviations that ‘occur in reality’.\(^\text{21}\) For example, if deviations from numerical targets were possible to meet operational requirements or to appoint persons with scarce skills,\(^\text{22}\) they escaped the classification as quotas — the functional approach. In contrast, Nugent AJ required flexibility in individual decisions when implementing numerical targets.\(^\text{23}\) According to Nugent AJ, flexibility required the discretion to take factors like ‘individual experience, application and verve’ into account in every decision,\(^\text{24}\) the individualised approach.

Following the decisions in *Van Heerden*, *Barnard* and *Correctional Services*, in *SARIPA* CC, the permissibility of quotas per se under s 9(2) of the Constitution featured for the first time before the Court. The *SARIPA* case concerned a policy drafted by the Minister of Constitutional Development & Another v South African Restructuring and Insolvency Practitioners Association & Others [2018] ZACC 20; 2018 (5) SA 349 (CC) (‘SARIPA CC’).

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\(^{13}\) Section 9(3) of the Constitution prohibits direct and indirect unfair discrimination on one or more grounds including ‘race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth.’

\(^{14}\) The *Harksen* test was established in the landmark *Harksen v Lane NO & Others* 1997 ZACC 12, 1997 11 BCLR 1489 case (‘*Harksen*’) at paras 42–51. The test entails a complex fairness and proportionality standard to determine whether there has been unfair discrimination in a case.

\(^{15}\) *Van Heerden* (note 7 above) at para 33.

\(^{16}\) Minister of Constitutional Development & Another v South African Restructuring and Insolvency Practitioners Association & Others [2018] ZACC 20; 2018 (5) SA 349 (CC) (‘SARIPA CC’).


\(^{18}\) Section 15(3), EEA.

\(^{19}\) *Barnard* (note 17 above) at para 49.

\(^{20}\) *Correctional Services* (note 17 above) at paras 51 (per Zondo J) and 118 (per Nugent AJ).

\(^{21}\) Ibid at para 53.

\(^{22}\) Ibid.

\(^{23}\) Ibid at para 114.

\(^{24}\) Ibid at para 118.
Development regarding the appointment of provisional trustees to administer insolvent estates pending the appointment of final trustees. The policy sought to redress a disproportionate allocation of work to white males in the insolvency industry and ‘facilitate access to the industry and restore the previously disadvantaged insolvency practitioners’ rights to equality, dignity and … realise their right to follow their trade, profession or occupation’.25 The applicants in the case, associations which represented the interests of insolvent practitioners such as provisional trustees challenged the Minister’s policy on several grounds.26 One of the grounds of the challenge and the focus of this article was the allegation that the policy amounted to a rigid quota and thus fell outside the scope of s 9(2) of the Constitution.27 The lower courts in the case — the High Court and Supreme Court of Appeal —extended the prohibition of quotas beyond the scope of s 15(3) of the EEA to find that s 9(2) of the Constitution prohibits the use of quotas.28 On appeal before the Constitutional Court, Jafta J did not challenge the approach taken by the lower courts, nor did he expressly endorse the approach. Instead, he found the impugned policy unconstitutional on other grounds.29 However, in his dissenting opinion, Madlanga J showed some scepticism towards the lower court’s extension of the prohibition beyond the EEA. While he did not make any definitive findings, he reasoned that ‘before invalidating a measure meant to achieve substantive equality for being rigid, it must be looked at in context or in a “situation-sensitive” manner. It can never be a one-size-fits-all’.30

Thus far, some academic commentary has supported and bolstered the approach taken in the lower court judgments.31 According to Kohn and Cachalia, the inflexibility of the policy in SARIPA ‘was offensive to the dignity of those affected in a manner which amounted to “undue harm”’.32 For Pretorius, rigidity in affirmative action measures in employment frustrates the life chances of non-beneficiaries, ‘causing race or gender-based contests’ that are not in line with an ‘inclusive notion of substantive equality’.33 Sharing the scepticism in Madlanga J’s dissent, in this article, I disagree with these arguments and argue that quotas can fall within the range of permissible measures to advance and protect disadvantaged groups as envisaged by s 9(2) of the Constitution.


26 This includes the argument that the policy unlawfully fettered the Master of the High Court’s discretion; that it was irrational; that it failed the Van Heerden test; that it was designed without consultation and was thus procedurally unfair. South African Restructuring and Insolvency Practitioners Association v Minister of Justice and Constitutional Development; In Re: Concerned Insolvency Practitioners Association NPC v Minister of Justice and Constitutional Development [2015] ZAWCHC 1, 2015 (2) SA 430 (WCC) (‘SARIPA HC’) at para 65.

27 Ibid at para 137.

28 SARIPA HC (note 26 above) at paras 201–208; SARIPA SCA (note 25 above) at paras 29–32.

29 The policy failed the Van heerden test because, inter alia, the classification of its beneficiary groups would have the impact of perpetuating the disadvantage of Black male and female insolvency practitioners who were not citizens at the time of the democratic transition (27 April 1994). SARIPA CC (note 16 above) at paras 41–43.

30 Ibid at para 80.


32 Kohn & Cachalia (note 12 above) 176.

33 Pretorius (note 12 above) 176.
Through a close and critical examination of the lower courts’ and Constitutional Court judgments in this case, this article will argue that quotas can pass the threshold set by the Van Heerden test. The impugned policy in SARIPA failed for two reasons. First, the courts, especially the lower courts, applied a much higher standard of review than that envisaged under the Van Heerden test. In particular, the courts placed a high evidentiary burden on the Minister to establish that the policy would, in fact, achieve its purpose. In instances where there was a dispute in evidence, the courts erred on the side of the applicants in the case — finding the policy arbitrary and irrational for lack of evidence. Second, the lower courts, and accompanying academic commentary, take the position that the mere rigidity of quotas violates the right to dignity of non-beneficiaries and beneficiaries of affirmative action.

With regards to the first argument, this article will argue that the Van Heerden test requires a measure of deference to the design of affirmative action measures. This explains why they need only be ‘reasonably likely’ to achieve their purpose. In addition, they need not be necessary or even the most effective tool to realise their purpose. A part of this deferent approach, and because of the importance of s 9(2) measures, is that the burden of proof lies with parties seeking to challenge measures which genuinely seek to advance disadvantaged groups. This is not the approach taken by the courts. With regards to the second argument, drawing from the Court’s own jurisprudence and against the context of prevailing inequality in South Africa, I argue that rigidity per se is not inherently incompatible with the right to dignity. This is because s 9(2) only prohibits measures which demean or create the impression that persons are ‘in some way inferior’, ‘less worthy’; or reduce persons to ‘an underclass’ denigrating their place in society and in the Constitution. While measures which create an absolute barrier for the advancement of non-beneficiary groups and other adversely affected groups will likely have this impact, the use of quotas, however rigid, will not necessarily have this impact. Every examination of a quota requires a contextual, ‘situation-sensitive’ approach.

I have divided the article into five parts. Part II briefly explores the meaning of the commitment to substantive equality and locates affirmative action measures as one of the tools to achieve its goals — fulfilling the realisation of the right to equality and dignity of disadvantaged groups. This part also outlines the appropriate standard of review for affirmative action, a relatively deferential proportionality assessment that, while balancing the competing rights that arise in affirmative action cases, tips the scale in favour of affirming the constitutionality of affirmative action measures. As the core argument against quotas is that they violate the right to dignity, part II interrogates the complex relationship between affirmative action and the right to dignity. On the one hand, affirmative action measures are tools to realise the right to equality and dignity of disadvantaged groups. On the other, their focus on individual characteristics such as race and gender could impair the right to dignity of persons, in particular, the non-beneficiaries. In this regard, part II argues that looking at persons through the lens of a specific characteristic (race, gender, disability status or an

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34 Van Heerden (note 7 above) at para 42.
35 Ibid at para 43.
36 Ibid at paras 33–35.
37 Khosa & Others v Minister of Social Development & Others, Mahlaule & Another v Minister of Social Development 2004 ZACC 11, 2004 (6) SA 505 CC (‘Khosa’) at para 74.
38 Barnard (note 17 above) at para 180 (per Van der Westhuizen J).
39 This approach is based on Albertyn’s assessment and ‘best reading’ of the s 9(2) Van Heerden test, see, Albertyn (2015) (note 12 above) at 729–731.

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intersection of these) and redistributing resources (jobs, promotions, admissions) based on these characteristics, and for purposes of redressing group-based disadvantage does not necessarily violate the right to dignity. The question that should be asked is whether a specific affirmative action measure has the impact of (i) entrenching or creating new patterns of disadvantage; (ii) treating or creating the perception that persons or groups are inferior, or form part of an ‘underclass’; (iii) demeaning such persons or groups.

The argument that quotas fall outside the range of permissible s 9(2) measures is drawn from the prohibition of quotas under the EEA. Thus, part III explores how the Court has defined quotas under the EEA. This part shows that on the one hand, the Court had no problem with affirmative action measures which allow for the preferential treatment of beneficiaries of affirmative action under the EEA — women, Black people (defined as African, Indian, Coloured and Chinese people) and people with disabilities. At the same time, it defined quotas in such a way that such measures are required to retain a measure of flexibility. One approach to this flexibility, Nugent AJ’s individualised approach, contradicts the very purpose of affirmative action measures under the EEA.

In part IV I explore the expansion of the prohibition of quotas in Mathopo J and Katz AJ’s reasoning in the lower court judgments and juxtapose this approach with Madlanga J’s dissenting opinion in the Court’s judgment. Part IV illustrates the way in which the lower court judges’ reasoning and conclusions draw from the EEA’s flawed jurisprudence, and find that affirmative action measures must be flexible in taking the individual characteristics, skills, expertise and experience of persons into account; failing which they are rigid quotas. Without a contextual and ‘situation sensitive’ inquiry, this rigidity is erroneously presumed arbitrary, irrational and as a violation of the right to dignity.

Using the SARIPA case and correctly applying the Van Heerden test, part V makes a positive case for the permissibility of quotas. Part V argues that, while there were gaps in the statistical evidence relied on by the Minister, inconsistencies and a lack of clarity about how the impugned policy in SARIPA would be implemented, neither this nor the rigidity of the policy should have been the linchpin for finding that the policy failed the section-9(2) threshold test.

Part VI concludes with the argument that, while hidden behind the protection of the right to dignity, the argument that rigidity, defined as the failure to take individual merit, skills and expertise into account, undermines the commitment to substantive equality.

II SUBSTANTIVE EQUALITY AND THE VAN HEERDEN INQUIRY

A Unpacking s 9(2) of the Constitution

Before an analysis of the standard set in Van Heerden, it is important to understand the structure of the equality right in s 9 of the Constitution. There are three key sections to the equality right. The first, s 9(1) provides that everyone is equal before the law and has the right to equal protection and benefit of the law. Section 9(1) prohibits differentiation that is arbitrary and irrational. As noted in the introduction, s 9(2) provides that, when promoting

40 These are the designated beneficiary groups under s 1 of the EEA.
41 SARIPA CC (note 16 above) at para 80.
the achievement of equality, ‘legislative and other measures designed to protect or advance persons, or categories of persons, disadvantaged by unfair discrimination may be taken.’ Section 9(3) of the Constitution prohibits direct and indirect unfair discrimination on one or more grounds, including race, gender, sex, pregnancy, marital status, ethnic or social origin. Another relevant section is s 9(5); this provision provides that unfair discrimination on a listed ground in s 9(3) is presumed to be unfair.

In Van Heerden, the Court had to consider the constitutionality of a pension scheme that required higher employer contributions for new members of the post-1994 democratic Parliament, than for those who had been in Parliament under the apartheid dispensation. The majority of the new parliamentarians and thus, the beneficiaries of the higher contributions where Black persons. The purpose of the policy was to distribute pension benefits on an equitable basis and thus diminish the inequality between privileged and disadvantaged parliamentarians. The applicant in the case argued that the scheme unfairly discriminated against the old parliamentarians, the majority of whom were white, based on their race. In particular, he argued that affirmative action measures under s 9(2), if based on a listed ground in s 9(3), should be presumed to be unfair and the party seeking to defend such measure carried the onus to show that they were fair. The state defended the claim as a valid affirmative action measure under s 9(2) of the Constitution. A key issue for the Court was whether affirmative action measures should be subject to the unfair discrimination analysis under s 9(3) of the Constitution, the Harksen test.

In light of our history of predominantly race and gender based domination and oppression, the Harksen case rightly set a high threshold for defending s 9(3) unfair discrimination claims. The test is a two-stage evaluation of unfair discrimination. In the first stage, the court must determine if a differentiation amounts to discrimination. Having established that a measure is discriminatory, the second leg of the inquiry requires the court to determine whether the discrimination is unfair. According to s 9(5), discrimination on a specified ground in s 9(3) is presumed to be unfair. If it is not on a specified ground, the complainant bears the onus to prove the unfairness of the discrimination. This is a value judgment which focusses on the impact of the discrimination on the complainant and his or her group, in particular, their right to dignity.

An important feature of the Harksen test is the centrality of dignity in the inquiry. As Goldstone J noted, ‘The prohibition of unfair discrimination in the Constitution provides a bulwark against invasions which impair human dignity, or which affect people adversely in a comparably serious manner’. Dignity operates at two levels in the Harksen test. First, it is used to differentiate between mere differentiation and discrimination. Whether or not there

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43 Van Heerden (note 7 above) at paras 10–11.
44 Ibid at paras 17 and 52.
46 Ibid.
47 Ibid.
48 Ibid at para 45.
49 Ibid at para 51.
51 Harksen (note 14 above) at para 50.
is discrimination depends on whether ‘the ground is based on attributes and characteristics which have the potential to impair the fundamental human dignity of persons as human beings’. ⑤2 Second, it is the most important factor taken into account when determining whether discrimination is unfair.⑤3

A significant overlap between the Harksen test and s 9(2) measures is that the analysis of the impact that a measure has on the complainant in s 9(3) claims takes a range of factors into account, including the nature of the provision or power and the purpose sought to be achieved by it.⑤4 That a measure serves the purposes of furthering the achievement of equality has ‘a significant bearing on the question whether complainants have in fact suffered the impairment in question’. ⑤5 Thus, affirmative action measures can pass the Harksen test.⑤6

In Van Heerden, the High Court judgment had applied the Harksen test.⑤7 Applying that high threshold, it found the pension scheme unconstitutional.⑤8 On appeal to the Constitutional Court, the Court began by asserting its commitment to substantive equality.⑤9 Substantive equality is a complex concept. Rooted in critical approaches to law and politics, it seeks to challenge the ‘classic liberal ideal’ of formal equality of treatment, exposing that approach as entrenching and perpetuating inequality.⑤0 Formal equality is rooted in the idea that ‘likes should be treated alike’.⑤1 Under a formal conception of equality, all forms of unequal treatment are arbitrary and irrational. Accordingly, a formal conception of equality would prohibit positive measures (including affirmative action) to advance disadvantaged groups. Proponents of substantive equality, on the other hand, have exposed the way in which formal equality’s abstract individualism and legal neutrality have masked the complex reality of inequality in which people have unequal access to resources or lack ‘sufficient power to control or value their own lives’.⑤2 In contrast, substantive equality has embraced unequal treatment,⑤3 recognising that the goals of equality cannot be achieved by insisting on identical treatment

⑤2 Ibid at para 46. In Hoffmann v South African Airways 2000 ZACC 17, 2001 1 SA 1 (HIV status) and in Khosa (note 37 above) (Citizenship).
⑤3 Harksen (note 14 above) at para 51.
⑤4 Ibid.
⑤5 Ibid.
⑤6 Solidariteit Helpende Hand NPC & Another v Minister of Basic Education & Others 2017 ZAGPPHC 1220. (An example of a purported section-9(2) measure fails the threshold in Van Heerden but passes muster under s 9(3).)
⑤7 Ibid at paras 12–13.
⑤8 Ibid at para 15.
⑤9 Van Heerden (note 7 above) at para 31.
⑤3 National Coalition (note 50 above) at paras 60–62.
WHAT'S SO WRONG WITH QUOTAS?

in all circumstances. A commitment to substantive equality is a positive commitment to progressively eradicate ‘socially constructed barriers to equality and to root out systematic or institutionalised under-privilege’. Affirmative action measures, in their preference for and intention to ‘advance and protect’ disadvantaged groups are a core ‘statement of substantive equality’.

In line with the commitment to substantive equality, Moseneke J held that affirmative action measures under s 9(2) were not a derogation from the right to equality, and did not amount to unfair discrimination. Instead, he held that they were a substantive part of the commitment to realising the right to equality. Practically, this meant that affirmative action measures which met the requirements of s 9(2) of the Constitution did not violate the guarantee of equal protection and benefit of the law in s 9(1). Further, the Harksen test did not apply to s 9(2) measures. Thus, even when based on a listed ground in s 9(3), they did not attract the presumption of unfairness in s 9(5) and were not a form of unfair discrimination. According to the Court, s 9(2) was a defence in unfair discrimination claims under s 9(3)–(5). However, if a measure failed to meet the threshold in s 9(2), it could still be saved if it was shown to be fair under s 9(3)–(5).

Moseneke J’s majority judgment in Van Heerden gave three strong, value-based reasons for rejecting the application of the Harksen test to s 9(2) measures. First, he held that subjecting affirmative action measures to the s 9(3) inquiry would mean that the provisions in the equality right were internally inconsistent or that s 9(2) was ‘a mere interpretative aid or even surplusage’. As Mokgoro J wrote in support, such an approach would mean that:

The whole structure of our equality clause and the important aim of substantive equality would be undermined by an approach which requires the state to show that measures which aim at advancing the substantive notion of equality and fostering a society which no longer resembles that of the South Africa of old are fair. It is an invariable consequence of enacting measures that advance certain groups that other groups will be disadvantaged in that regard, albeit that this would not be the intention of such measures.

The quote above encapsulates the need for more deference than in the context of s 9(3) unfair discrimination cases — a deference rooted in the acknowledgement of the important purpose served by s 9(2) measures — realising the right to equality and dignity of historically disadvantaged groups. It also accepts that these measures may cause harm to other groups, a cost that cannot render them unconstitutional unless the measure constitutes ‘an abuse of power or impose such substantial and undue harm on those excluded from its benefits that our long-term constitutional goal would be threatened’. This is a relatively high benchmark. In a sense, the Court considers these measures to be fair discrimination. Thus, as Sachs J holds in

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64 Hugo (note 50 above) at para 41.
65 Van Heerden (note 7 above) at para 31.
67 Van Heerden (note 7 above) at para 32.
68 Ibid.
69 According to Jafita J, s 9(2) ‘insulates from attack measures adopted to protect or advance people who were disadvantaged by unfair discrimination’ SARIPA CC (note 16 above) at para 38.
70 Van Heerden (note 7 above) at para 36.
71 Ibid at para 33.
72 Ibid at para 77.
73 Ibid at para 44.
his concurring opinion, in the context of South Africa’s ‘specific historical and constitutional context’ the reviewing court must harmonise the ‘fairness inherent in remedial measures with the fairness expressly required of the state when it adopts measures that discriminate between different sections of the population’.74

The second reason for rejecting the Harksen approach had to do with the presumption of unfairness. The presumption of unfairness in s 9(5) of the equality right would catch most affirmative action measures as they are likely to be based on a listed ground. In this regard, Moseneke J argued that:

I cannot accept that our Constitution at once authorises measures aimed at redress of past inequality and disadvantage but also labels them as presumptively unfair. Such an approach, at the outset, tags section-9(2) measures as a suspect category that may be permissible only if shown not to discriminate unfairly. Secondly, such presumptive unfairness would unduly require the judiciary to second guess the legislature and the executive concerning the appropriate measures to overcome the effect of unfair discrimination.75

This quote encapsulates two problems with the presumption. First, as McConachie has argued, it creates the ‘expressive harm’ that affirmative action measures are unfair.76 The expressive harm would come from placing the interests of the complainants in affirmative action cases at the core of the analysis and the important purpose (fulfilling the right to equality and dignity of the beneficiaries) secondary, ‘suggesting that the benefits of an affirmative action measure for historically disadvantaged groups are only of secondary concern’.77 In \textit{R v Kapp}, the Canadian Supreme Court noted a similar problem with treating affirmative action measures under s 15(2) as a form of discrimination under s 15(1) of the Canadian Charter of Rights and Freedoms, noting the ‘symbolic problem of finding a program discriminatory before “saving” it as ameliorative, while also giving independent force to a provision that has been written as distinct and separate from s. 15(1)’.78 Second, the Court rejected the presumption to err on the side of deference in order to preserve measures which seek to redress unfair discrimination. This is arguably in light of the recognition that the presumption can be difficult to rebut, especially when the impact of affirmative action is not easy to pin down.79 The implications of this are that the onus in affirmative action cases ordinarily rests with the party seeking to challenge an affirmative action measure.80

The third reason for rejecting the Harksen test was related to the different focus envisaged in the review of s 9(2) measures. Mokgoro J made it clear that the Harksen test’s centring of individual dignity was not appropriate for affirmative action measures as it would focus unduly on the impact of the complainant.81 Contemplating an approach that is focussed on the purposes of the affirmative action measure. For Mokgoro J, s 9(2) is ‘forward looking’ and requires the review of these measures to be looked at from the perspective of the purpose of promoting the achievement of equality and ‘on the group advanced and the mechanism used

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74 Ibid at para 136 (my emphasis).
75 Ibid at para 33.
76 McConachie (note 12 above) at 173.
77 Ibid at 172.
78 \textit{R v Kapp} [2008] 2 SCR 483 \textit{Kapp} (‘Kapp’) at para 40.
79 \textit{Van Heerden} (note 7 above) at para 41 (Moseneke J notes that the ‘future is hard to predict’).
80 Ibid at paras 33–35. Also see McConnachie (note 12 above) (On the varying intensity of review and the possibility that the onus can shift depending on the facts of a case).
81 \textit{Van Heerden} (note 7 above) at para 80.
to advance it’.\textsuperscript{82} In contrast, s 9(3) focussed on the complainant and the impact of the measure on her and her group.\textsuperscript{85}

Having rejected the \textit{Harksen} test, Moseneke J set a more deferent standard for the review of affirmative action — the \textit{Van Heerden} test, I turn to this below.

\section*{B \hspace{1em} The \textit{Van Heerden} test}

As noted in the introduction, the \textit{Van Heerden} test is used to determine whether a measure falls within the scope of s 9(2) of the Constitution. There are three prongs to the \textit{Van Heerden} test. The first requires a measure to target persons or categories of persons who have been disadvantaged by unfair discrimination. The second requires that the measure must be designed to protect or advance such persons or categories of persons. The third requirement is that the measure must promote the achievement of equality.\textsuperscript{84} These three requirements are relatively vague, and the test has been subject to different interpretations and criticisms.\textsuperscript{85}

Criticising the decision in \textit{Van Heerden} as requiring a mere rational link between an affirmative action measure and its purpose, Pretorius has argued that the \textit{Van Heerden} test, in excluding the fairness and proportionality inquiry applicable to unfair discrimination claims under \textit{Harksen}, ‘has the potential to harm core constitutional functions and values. According to Pretorius, the level of deference in \textit{Van Heerden} is an ‘instrumentalist attitude towards constitutional adjudication’ and an unwillingness to consider how other constitutional values place limits even on the pursuit of important goals.\textsuperscript{86} Moreover, he has argued that the standard of review is contrary to the commitment to a culture of justification and public accountability.\textsuperscript{87} For Pretorius, without the fairness and proportionality analysis under \textit{Harksen}, ‘courts would simply lack the analytical framework and factual focus for a situation-specific contextualisation, which is comprehensive and inclusive enough to bring all competing interests and considerations into the equation’.\textsuperscript{88}

Pretorius’ critique is based on a reading that the \textit{Van Heerden} test merely requires s 9(2) measures to be rational.\textsuperscript{89} As will be shown below, a more substantive reading of the \textit{Van Heerden} test is possible. In his analysis of the \textit{Van Heerden} case, Pretorius also fails to engage with the way in which Moseneke J went about applying the test in \textit{Van Heerden} — an approach which included an analysis of the policy as a whole and the impact it would have on the excluded group, balancing the multiple and competing rights and interests in affirmative action cases. For Pretorius, that Moseneke J undertook an analysis of the impact of the measure and its purpose is a ‘contradiction’ rather than an indication that the \textit{Van Heerden} test required more

\begin{footnotesize}
\textsuperscript{82} Ibid at para 78.
\textsuperscript{83} Ibid at para 79.
\textsuperscript{84} \textit{Van Heerden} (note 7 above) at para 37.
\textsuperscript{86} Pretorius (2010) (note 85 above) at 553.
\textsuperscript{87} Pretorius (2013) (note 85 above).
\textsuperscript{88} Pretorius (2010) (note 85 above) at 555.
\textsuperscript{89} Pretorius (2009) (note 12 above) at 414.
\end{footnotesize}
than just rationality review.\textsuperscript{90} As Albertyn has argued, this is an ‘impoverished interpretation’ of \textit{Van Heerden}.\textsuperscript{91}

Contrary to the argument made by Pretorius, the move away from the \textit{Harksen} test is not a derogation from the commitment to a culture of justification and accountability, nor is an indispensable balancing only possible within the confines of \textit{Harksen}. The Court is still required to enquire into the reasons underlying the affirmative action measure and its impact on the beneficiaries and those adversely affected thereby. In \textit{Van Heerden}, for example, Moseneke J held that the scheme had to be reviewed as a whole, looking at the ‘history of transition from the old to the new 1994 Parliament; the duration, nature and purpose of the scheme; the position of the complainant and the impact of the disfavour on the respondent and his class’.\textsuperscript{92} Based on the discussion above, the approach in \textit{Van Heerden} should be seen in the context of a Court rejecting too high a standard for the review of affirmative action. The best reading, (in the sense that it coheres with the commitment to substantive equality) of the \textit{Van Heerden} test is that it is a deferent species of proportionality analysis.\textsuperscript{93} It allows for what Kohn and Cachalia call a ‘light-touch form’ of proportionality, or ‘proportionality simpliciter’,\textsuperscript{94} a standard higher than rationality but lower and different from the \textit{Harksen} test.\textsuperscript{95}

1 Van Heerden test as a species of proportionality

Proportionality is ‘a tool of practical reasoning that is applied whenever we deliberate about the correct course of action in the face of competing rights and scarce resources’.\textsuperscript{96} In the affirmative action context, proportionality can be used to resolve the tension between the important purpose served by affirmative action — promoting the achievement of equality for the disadvantaged groups who are beneficiaries under these measures — and the rights of those adversely affected thereby. In contrast with rationality review, proportionality ‘can generate insights into the nature and structure of inequality that might otherwise elude judges’ when resolving the conflict that arises in equality cases.\textsuperscript{97} In addition, ‘It can be a tool for revealing invidious motivation and a useful framework for more fine-grained, contextual analyses of the governmental interests asserted and for more transparent consideration of competing constitutional values and governmental interests’.\textsuperscript{98} Requiring proportionality ensures that the purpose of a measure does not excessively overdetermine the constitutionality of an affirmative action measure.\textsuperscript{99} This allows the courts to tease out the impact that the measure has on the intended beneficiary class as well as the non-beneficiaries.

There is no single approach to proportionality analysis. In South Africa, proportionality is encapsulated in the s 36(1) limitations clause. Section 36(1) of the Constitution provides that

\begin{itemize}
  \item \textsuperscript{90} Pretorius (2009) (note 12 above) at 418–419.
  \item \textsuperscript{91} Albertyn (2015) (note 12 above) at 729.
  \item \textsuperscript{92} \textit{Van Heerden} (note 7 above) at para 45.
  \item \textsuperscript{93} A Barak \textit{Constitutional Rights and Their Limitations} (2012) (On different kinds of proportionality assessment).
  \item \textsuperscript{94} Kohn & Cachalia (note 12 above) 160.
  \item \textsuperscript{95} Albertyn (2015) (note 12 above) at 729–730.
  \item \textsuperscript{96} McConnachie (note 12 above) 188.
  \item \textsuperscript{98} Ibid, 171–172
\end{itemize}
the right in the Bill of Rights may be limited by a law of general application ‘to the extent that
the limitation is reasonable and justifiable in an open and democratic society based on human
dignity, equality and freedom’. To determine this, a range of factors have to be taken into
account, including: the nature of the right; the importance of the purpose of the limitation;
the nature and extent of the limitation; the relation between the limitation and its purpose; and
whether there are less restrictive means to achieve the purpose. In Manamela, the Court held
that the different factors to be taken into account were not an exhaustive list, they were factors
to be considered ‘in an overall assessment as to whether or not the limitation is reasonable and
justifiable in an open and democratic society’.\textsuperscript{100} The approach to proportionality in South
Africa entails a balancing exercise ‘to arrive at a global judgment on proportionality … the
question is one of degree to be assessed in the concrete legislative and social setting of the
measure, paying due regard to the means which are realistically available in our country at this
stage, but without losing sight of the ultimate values to be protected’.\textsuperscript{101}

In other jurisdictions, proportionality usually entails four distinct stages.\textsuperscript{102} The first stage
of the inquiry examines whether the law or action serves a legitimate purpose (legitimacy or
proper purpose).\textsuperscript{103} The second leg requires there to be a rational connection between the
purpose and the means (suitability).\textsuperscript{104} The third leg is an analysis of whether the measure
is the least restrictive means to achieve a legitimate purpose (necessity).\textsuperscript{105} The last leg of
the proportionality inquiry is an assessment of whether, on balance, the attainment of the
purpose outweighs the cost — the greater the degree of infringement of a right, the greater the
justification that must be given (balancing or proportionality \textit{stricto sensu}).\textsuperscript{106}

While Moseneke J’s majority judgment in Van Heerden did not expressly state that the Van
Heerden test set a proportionality standard, ‘proportionality’ was expressly mentioned in Sachs
J’s concurring opinion. Sachs J held that measures which seek to ‘destroy the caste-like character
of our society and to enable people historically held back by patterns of subordination to break
through into hitherto excluded terrain’ are not a form of unfair discrimination.\textsuperscript{107} Similarly, he
expressed the need for a measure of deference in affirmative action cases, noting that ‘Courts
must be reluctant to interfere with such measures, and exercise due restraint when tempted
to interpose themselves as arbiters as to whether the measure could have been proceeded
with in a better or less onerous way’.\textsuperscript{108} For Sachs J, s 9(2) did not extend to measures which

\textsuperscript{100} \textit{S v Manamela \& Another (Director-General of Justice Intervening)} [2000] ZACC 5, 2000 3 SA (‘Manamela’) at para 32.
\textsuperscript{101} Ibid.
\textsuperscript{102} Jackson (2015) (note 97 above) (For a general analysis of proportionality review and a positive argument for its
use in the US context); P Craig, ‘Proportionality, Rationality and Review’ [2010] \textit{New Zealand Law Review} 265 (for an analysis of proportionality review under European Union law); D Grimm, ‘Proportionality in Canadian
and German Constitutional Jurisprudence’ [2007] 64 \textit{The University of Toronto Law Journal} 383 (for an analysis
of proportionality in the German and Canadian context).
\textsuperscript{103} For a detailed analysis of this leg, see Barak (note 93 above) ch 9.
\textsuperscript{104} Ibid 10.
\textsuperscript{105} Ibid 11.
\textsuperscript{106} Ibid 12.
\textsuperscript{107} \textit{Van Heerden} (note 7 above) at para 152.
\textsuperscript{108} Ibid.
were ‘manifestly overbalanced’ and ‘disproportionate’.\footnote{109} Gesturing towards a proportionality analysis that is ‘heavily weighted in favour of opening opportunities for the disadvantaged’.\footnote{110}

McConachie has attempted to map the ‘traditional questions’ in the proportionality inquiry onto the \textit{Van Heerden} test.\footnote{111} While the assessment that the first two legs of the \textit{Van Heerden} test are akin to the suitability and legitimacy legs accord with Moseneke J’s application of the test in \textit{Van Heerden}, Moseneke J rejected the necessity requirement. To the extent that necessity means ‘that no other alternative must be available that can equally realise the purpose and be less invasive of the right in question’,\footnote{112} it is too high a threshold for affirmative action. A strict necessity requirement would allow very few affirmative action measures to pass muster. As judges would be required to consider all possible alternatives to realise the objective and be less restrictive to the rights and interests of those adversely affected by these measures, a strict approach to necessity would go against the need for deference in affirmative action cases. This is because the choice of measure taken involves a wide range of factors, ‘costs, practical implementation, the prioritisation of social demands and the needs’.\footnote{113} A strict application of necessity may ‘prevent limitations from passing constitutional muster that are indeed normatively justified when the balance of reasons is considered’.\footnote{114}

In light of the high threshold set by necessity, Moseneke J held that ‘The provisions of section 9(2) do not prescribe such a necessity test because remedial measures must be constructed to protect or advance a disadvantaged group. They are not predicated on a necessity … and so require supporters of the measure to establish that there is no less onerous way in which the remedial objective may be achieved’.\footnote{115} McConnachie argues that this should be read as merely stating that the presence of alternative ways should not be determinative of whether an affirmative action measure is proportionate, it should merely be one of the factors taken into account.\footnote{116} I disagree with McConachie’s argument.

The exclusion of necessity need not take us outside of the realm of proportionality analysis. As Barak notes, some jurisdictions use a ‘softer approach to proportionality’, requiring a focus on ‘proper purpose, rational connection, and a proper relation between the fulfilment of the purpose and the damage to the constitutional right’.\footnote{117} This ‘softer’ approach or what Albertyn characterises as ‘higher than rationality, but perhaps lower than (and different from) the fairness threshold of s 9(3)’,\footnote{118} is arguably what Moseneke J envisaged. This is a relatively deferent standard of proportionality. This deference captures the important purposes served by s 9(2) and the need to realise the egalitarian vision of the Constitution.\footnote{119} However, because we have multiple groups who benefit from affirmative action, whose rights and interests may come

\footnote{109} Ibid.
\footnote{110} Ibid.
\footnote{111} McConnachie (note 12 above) at 189.
\footnote{113} \textit{Manamela} (note 100 above) at para 34 (per majority) and 95 (per minority).
\footnote{114} Bilchitz (note 112 above) at 44.
\footnote{115} \textit{Van Heerden} (note 7 above) at para 45.
\footnote{116} McConnachie (note 12 above) at 190.
\footnote{117} Barak (note 93 above) at 132.
\footnote{119} \textit{Van Heerden} (note 7 above) at para 33 (explaining why the presumption of unfairness should not be applicable to s 9(3), Moseneke J notes that such a presumption would unduly require the courts to second guess the legislature and executive concerning the appropriate measures to overcome the effect of unfair discrimination).
into conflict, the level of deference exercised in each case should vary. In cases brought by historically disadvantaged groups who have been adversely affected by affirmative action, the courts should heighten the intensity of review and exercise less deference.

Against this background, in part V of the article, I draw from Mosebeni’s analysis in Van Heerden and unpack each leg of the Van Heerden test and apply it to SARIPA. However, before moving onto part VI, there is one important issue to consider — the relationship between section-9(2) measures and the section-10 right to dignity. There are different rights and interests that have to be balanced when determining whether a measure passes s 9(2). The most important for this article is the s 10 right to dignity. As will be seen in the discussion below, the right to and value of dignity plays an important role in equality cases. It is particularly salient in the affirmative action context because affirmative action measures focus on attributes such as race, gender or disability to redistribute resources, this focus could be seen as the kind of ‘substantial undue harm’ prohibited in the third leg of the Van Heerden test. As will be seen later in the article, this is the argument made against quotas. It is thus important to critically discuss the role of dignity in the Van Heerden analysis. I turn to this below.

2 Dignity and affirmative action

As a justiciable right and value, dignity permeates South African constitutional jurisprudence. As a value, dignity sits alongside the value of equality and freedom as foundational to the new democratic South Africa. The right to dignity is protected in s 10 of the Constitution; it provides that every person ‘has inherent dignity and the right to have their dignity respected and protected.’ The value and right to human dignity have played an important role in the Court’s jurisprudence. As noted previously, dignity sits at the core of the Harksen test, so central that some consider it the ‘lodestar’ or ‘organising principle’ of the right to equality. The Harksen test’s focus on dignity has been subject to much criticism. The strongest charge being that it has subsumed substantive equality’s focus on redressing group based-disadvantage with an ‘evaluation of impairment of individual dignity as equal moral

120 McConnachie (note 12 above) at 190.
121 Ibid.
122 Van Heerden (note 7 above) at para 44.
123 Constitution, s 1 (Dignity as a founding value); s 36(1) (The limitation of rights must be reasonable and justifiable in an open and democratic society, based on the values of dignity, equality and freedom); s 7(1) (Dignity is one of three democratic values, the other two being equality and freedom). See also, Dawood & Another v Minister of Home Affairs & Others; Shalabi & Another v Minister of Home Affairs & Others; Thomas & Another v Minister of Home Affairs & Others 2000 ZACC 8 2000, 3 SA 936 (‘Dawood’) at para 35 (On the value and importance of dignity).
124 For an analysis of the role that dignity has played in the Court’s jurisprudence, see D Cornell (ed) The Dignity Jurisprudence of the Constitutional Court of South Africa: Cases and Materials (2013).
worth’. In the affirmative action context, the question which arises is, as Albertyn puts it ‘how do you justify positive measures that seek to redress collective disadvantage but also affect individual members of other, usually more privileged groups?’ Rather than repeat the already well-argued point that focusing on the Court’s largely individualised conception of the right to dignity in affirmative action cases will leave very little space to justify measures which seek to redress group-based disadvantage, the paragraph that follows will attempt to suggest a way to harmonise the right to dignity with affirmative action measures.

aa Individual and collective dimensions of dignity

The Court has broadly defined dignity as encompassing equal concern and respect for the inherent worth of all persons. The commitment to this conception of dignity can be seen in the Court’s description of human dignity as ‘intrinsic human worth’ in Dawood; and in National Coalition — ‘the value and worth of all individuals’ requiring that ‘law and public institutions acknowledge the variability of human beings and affirm the equal respect and concern that should be shown to all as they are’. This conception of dignity is focussed on the individual and is the most prominent conception of dignity in the Court’s unfair discrimination jurisprudence, lending itself to the critique noted previously. However, S Woolman argues that there is another ‘collective conception’ of dignity.

The collective conception of dignity moves away from the focus on the individual and is concerned with the dignity of society as a whole. While not a prominent feature in the Court’s equality jurisprudence, the concern with a more collective conception of dignity can be seen in some of the Court’s socio-economic-rights cases. These cases recognise that the failure to realise the fulfilment of socio-economic rights does not merely violate the individual dignity of persons; it also demeans society as a whole. In PE Municipality, a case concerning the eviction of families from land owned by the Municipality, the Court noted:

It is not only the dignity of the poor that is assailed when homeless people are driven from pillar to post in a desperate quest for a place where they and their families can rest their heads. Our society as a whole is demeaned when state action intensifies rather than mitigates their marginalisation.

A similar idea was expressed in Khoza, a case for access to social welfare for non-citizen permanent residence. The Court in Khoza held that:

Sharing responsibility for the problems and consequences of poverty equally as a community represents the extent to which wealthier members of the community view the minimal well-being


130 Ibid.

131 For an analysis of the court’s dignity jurisprudence, see Cornell (note 124 above); Ackermann (note 125 above).

132 Dawood (note 123 above) at para 35.

133 National Coalition (note 50 above) at para 28.

134 Ibid at para 135 (per Sachs J).

135 Woolman (note 128 above) ch 36 at 15 (For an analysis of what Woolman calls the ‘collective dimension’ of dignity).


137 Ibid at para 18.
of the poor as connected with their personal well-being and the well-being of the community as a whole.\textsuperscript{138}

The idea in the quote above is that we can justifiably impose burdens on more privileged members of society to redistribute resources and redress disadvantage — this affirms the dignity of society as a whole. This more collective conception of dignity can be traced to the landmark \textit{Makwanyane} case.\textsuperscript{139} In that case, Langa J made a connection between dignity and the African value of Ubuntu. In this regard, he held that the commitment to dignity heralds:

\begin{quote}
\[A\] culture which places some emphasis on communality and on the interdependence of the members of a community. It recognises a person’s status as a human being, entitled to unconditional respect, dignity, value and acceptance from the members of the community such person happens to be part of. It also entails the converse, however. The person has a corresponding duty to give the same respect, dignity, value and acceptance to each member of that community. More importantly, it regulates the exercise of rights by the emphasis it lays on sharing and co-responsibility and the mutual enjoyment of rights by all.\textsuperscript{140}
\end{quote}

The African value of Ubuntu has been used in many judgments by the Court,\textsuperscript{141} this ‘legal conception’ of Ubuntu broadly denotes a concern with community and ‘being’, combining ‘individual rights with a communitarian philosophy’.\textsuperscript{142} In \textit{Makwanyane}, Mokgoro J explained:

\begin{quote}
Generally, ubuntu translates as ‘humaneness’. In its most fundamental sense, it translates as personhood and ‘morality’… it expresses itself in umuntu ngumuntu ngabantu, describing the significance of group solidarity on survival issues so central to the survival of communities. While it envelops the key values of group solidarity, compassion, respect, human dignity, conformity to basic norms and collective unity, in its fundamental sense it denotes humanity and morality.\textsuperscript{143}
\end{quote}

While I do not support the idea that the value of dignity as defined by our Courts, even in its collective dimension, can capture the fullness of what this value encompasses;\textsuperscript{144} I do think that, to the extent that we accept Ubuntu as ‘a unifying motif of the Bill of Rights’\textsuperscript{145} or a ‘source of law’,\textsuperscript{146} even its limited legal form supports the argument for a conception of dignity that is not inimical to redistributive measures that impose burdens on some members of the community, in particular, the more privileged, to redress past injustice.

Seen against the backdrop of a concern with community, collective responsibility and a concern for others, redistributive measures under s 9(2), including affirmative action measures,

\begin{footnotes}
\textsuperscript{138} Khosa (note 37 above) at para 75.
\textsuperscript{139} \textit{S v Makwanyane & Another} 1995 ZACC 3, 1995 3 SA 391 (‘Makwanyane’) (In this case, the Court found that the death penalty was unconstitutional).
\textsuperscript{140} Ibid at para 224.
\textsuperscript{141} Ibid (The value of Ubuntu is evoked in the different judgments to support doing away with the death penalty); \textit{PE Municipality} (note 136 above) at para 37; \textit{Dikoko v Mokhatla} 2006 ZACC 10 2006, 6 SA 235 CC at paras 68–69; \textit{Afri-Forum & Another v Malema & Others} 2011 ZAEQC 2, 2011 6 SA 240 EqC (‘Malema’) at para 18.
\textsuperscript{142} \textit{PE Municipality} (note 136 above) at para 37.
\textsuperscript{143} \textit{Makwanyane} (note 139 above) at para 308.
\textsuperscript{144} M Ramose, ‘Ubuntu: Affirming a Right and Seeking Remedies in South Africa’ in L Praeg & S Magadla (eds) \textit{Ubuntu: Curating the Archive} (2016). Ramose separates the legal idea of Ubuntu from Ubuntu philosophy. He defines the latter as ‘the lived and living experience of human beings means that the human dignity of the Bantu-speaking peoples demands recognition, protection, promotion and respect on the basis of equality with all other human beings’. The exclusion of this in the Constitution is for him an exclusion of historically oppressed peoples from the domain of being. In any case, whatever form we give in law to Ubuntu, in my opinion, it will never fully capture according the kind of recognition, protection and promotion of equality that Ubuntu demands.
\textsuperscript{145} \textit{PE Municipality} (note 136 above) at para 37.
\textsuperscript{146} \textit{Malema} (note 141 above) at para 18.
\end{footnotes}
can be seen as tools to fulfil the right to dignity of the individual beneficiaries of affirmative action. These measures also affirm the dignity of society as a whole. The imperative for such measures is that a commitment to collective dignity cannot justify the subsistence of prevailing inequality. In a society where some groups have a disproportionate share of resources, the collective conception of dignity requires steps to be taken to redress this.

The collective conception of dignity fits well with providing an impetus for affirmative action. But there remains a tension between realising the right to equality and dignity through affirmative action and the impact that these measures can have on non-beneficiaries’ individual right to dignity. Describing the last leg of the Van Heerden test (the overall analysis of whether a measure promotes the achievement of equality), Moseneke J held that affirmative action measures should not ‘constitute an abuse of power or impose such substantial and undue harm on those excluded from its benefits that our long-term constitutional goal would be threatened’. Reiterating this in Barnard, he held that ‘Measures that are directed at remedying past discrimination must be formulated with due care not to invade unduly the dignity of all concerned’. At the same time, the Court acknowledged how affirmative action measures, in redressing group-based disadvantage, affirm the dignity of historically disadvantaged groups, and of society as a whole, even those adversely affected by these measures. Van der Westhuizen J thus noted:

The dignity of all South Africans is augmented by the fact that the Constitution is the foundation of a society that takes seriously its duties to promote equality and respect for the worth of all. Because affirmative substantive equality measures are one way in which these duties are given effect, these measures can enhance the dignity of individuals, even those who may be adversely affected by them.

However, it is still unclear how to resolve the apparent tension between the collective dimension of dignity and the individual conception of dignity. Two possible approaches can be seen in Van der Westhuizen J’s concurring opinion in Barnard, one more promising than the other.

bb Resolving the tension

The first approach is to say that the individual conception of dignity should yield to the collective conception. In this regard, Van der Westhuizen J in Barnard reasoned that the right to dignity is not absolute, ‘Aspects of a person’s right to dignity may sometimes have to yield to the importance of promoting the full equality our Constitution envisages’. However, in his analysis, it is not clear how to go about finding when individual dignity should yield to collective dignity or vice versa. It is also not clear what the basis for this approach would be. Confusingly, referring to the apparent tension between the claimant in that case’s right to dignity and the pursuit of dignity underlying the impugned affirmative action decision, Van der Westhuizen J held that:

147 Van Heerden (note 7 above) at para 44; Barnard (note 17 above) at para 30.
148 Van Heerden (note 7 above) at para 44.
149 Barnard (note 17 above) at para 30.
150 Ibid at para 89.
151 Ibid at para 175.
152 Ibid.
153 Ibid at para 169.
[T]he dignity of millions of black people who were victims of apartheid’s discrimination and who are still suffering its consequences can also not be weighed against the dignity of one white woman. The calculation required to restore the dignity of many after decades of unfair discrimination and the possible cost to the interests of individuals like Ms Barnard, was done when the Constitution was agreed on. Apartheid was a violation of human dignity, indeed a crime against humanity.\footnote{Ibid at para 178.}

The quote above starts with the idea that individual and collective dignity cannot be weighed against each other. Van der Westhuizen J then seems to suggest that the calculation had already been made, creating a hierarchy between individual and collective dignity — the latter taking precedence. But he did not provide a basis for this approach and thus did not really resolve the tension.

The second approach is to focus on the nature of the harms that both the collective and individual conceptions of dignity seek to protect. Under this approach, the evaluation of whether there has been a violation of the right to dignity should respond to the context of our history of domination and oppression, a history which provides context for why dignity is important to us. In \textit{Dawood}, the Court held that:

\begin{quote}
The Constitution asserts dignity to contradict our past in which human dignity for black South Africans was routinely and cruelly denied. It asserts it too to inform the future, to invest in our democracy respect for the intrinsic worth of all human beings.\footnote{\textit{Dawood} (note 123 above) at para 35.}
\end{quote}

The quote above makes clear that the importance of the value and the right to dignity is in the fact that it contradicts domination, subordination and oppression. This is a past in which Black people were ‘treated as not having inherent worth; as objects whose identities could be arbitrarily defined by those in power rather than as persons of infinite worth. In short, they were denied recognition of their inherent dignity’.\footnote{\textit{Prinsloo} (note 42 above) at para 31.} Accordingly, having experienced ‘the indignity and pain of legally regulated subordination, and the injustice of exclusion and humiliation through law, the majority committed this country to particularly generous constitutional protections for all South Africans’.\footnote{\textit{Minister of Home Affairs & Another v Fourie & Another} 2005 ZACC 19, 2006 1 SA 524 CC at para 9.}

Seen from this perspective, the collective and individual conceptions of dignity should be seen as bulwarks against measures which entrench or create new patterns of disadvantage, mark individuals and groups as inferior, mark them with a ‘badge of inferiority’, ‘demean’ them. Thus, measures which entrench or create new patterns of disadvantage, marking some groups as inferior and part of an ‘under-class’ should not pass the s 9(2) threshold. Writing in the context of s 9(2), in particular on the relationship between s 9(2) and dignity, Ackerman J captures this approach, noting that ‘Remedies are not justified which would result in turning the white “category of persons” into an underclass’.\footnote{\textit{Ackermann} (note 125 above) at 359.} ‘This is the most coherent approach to grappling with the tension between individual and collective dignity. It takes us away from asking whether collective dignity trumps individual dignity to a contextualised analysis of the dignity harm.

In relation to quotas, we would have to ask whether looking at persons through the lens of their group membership (race, gender) and placing their merit, capacity, skills, relative experience and expertise within the context of the historical oppression and domination of 158

\begin{quote}
\textit{Constitutional Court Review 2020}
\end{quote}
other groups, has the impact described above. My argument is that this approach would allow us to catch measures which would, ‘obliterate’ the opportunities of persons or those which have the impact of ‘permanently disqualifying a person from qualifying or practising a particular career or any other form of employment’. In the language of proportionality, these absolute barriers cannot be said to be a proportionate means of promoting the achievement of equality. As will be shown in part V, quotas, however rigid, do not inherently have this impact, they will in some cases be disproportionate.

While not fully capturing the approach suggested, in *Barnard*, Van der Westhuizen J was arguably looking for and could not find this harm to dignity, neither could any of the judges in that case. Having held that ‘An atomistic approach to individuals, self-worth and identity’ is not appropriate in the affirmative action context, he analysed the impact of the measure on the dignity of the complainant, within the context outlined above. First, he asked whether the claimant had been treated as a means to achieve an end in the sense that it reduced her to a member of an underclass to the extent that her place in society and in the Constitution is denigrated? Second, he asked whether the measure created an absolute barrier to her advancement, obliterating her chances to career advancement. He found that the impact on the dignity of the claimant was not severely restrictive. He reached this finding based on the fact that by the time claimant in the case appeared before the Court; she had been promoted to another position. From this we can draw the principle that affirmative action measures which treat persons or groups as second class, marking them with a badge of inferiority, as ‘underclass’, and which obliterate the chances of admission and advancement, creating an absolute barrier, violate the right to dignity – they are a disproportionate means of promoting the achievement of equality.

This approach can also be seen in Moseneke J’s assessment in *Van Heerden*. In *Van Heerden*, Moseneke J acknowledged that the measure in that case would mean that the non-beneficiary class would receive less pension contributions than the beneficiary class of the affirmative action measure. However, that impact was not sufficient to give rise to a finding that their right to dignity had been violated, a part of this reasoning was that the claimants in *Van Heerden* were not a vulnerable or marginalized class, they belonged to a class that was more socio-economically advantaged than the intended beneficiary class and would remain so even with the impugned policy in that case. Under these circumstances, that they would lose out on a monetary benefit could not rise to a finding that their right to dignity had been infringed.

In the last part of this article, I will apply the *Van Heerden* test and dignity as understood in this part to argue against the prohibition of quotas under s 9(2) of the Constitution and in favour of a contextual and ‘situation-sensitive’ approach. In parts III and IV, however, I turn to consider how the Court has defined quotas and the reasons it has offered to explain why they are prohibited — starting with the affirmative action jurisprudence under the EEA.

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159 Ibid at 361.
160 *Barnard* (note 17 above) at para 174.
161 Ibid at para 180 (own emphasis).
162 Ibid (own emphasis).
163 Ibid at para 183.
164 Ibid at para 181.
165 *Van Heerden* (note 7 above) at paras 53–54.
III THE ‘LOOK, FLAVOUR AND CHARACTERISTICS OF QUINTESSENTIAL QUOTAS’ IN SOUTH AFRICA

As already mentioned, the EEA expressly prohibits the use of quotas. Unfortunately, it does not define quotas, or provide any guidelines on how they differ from permissible numerical targets — this task was left to the courts. As will be seen in the analysis below, one of the Court’s approaches to defining quotas, the individualised approach, does not fit with the other provisions in the EEA. More problematically, it contradicts the very purpose of affirmative action under this statute.

To understand the Court’s definition of quotas, we have to take a close look at the affirmative action provisions in the EEA. Section 15(1) of the EEA defines affirmative action as ‘measures designed to ensure that suitably qualified people from designated groups have equal employment opportunities and are equitably represented in all occupational levels in the workforce.’ The EEA offers a very wide definition of ‘suitably qualified’. According to s 20(3), a person may be suitably qualified for a job as a result of any of, or a combination of the person’s formal qualifications, prior learning, relevant experience or the capacity to acquire, within a reasonable time, the ability to do the job. Further, when determining suitable qualification, s 20(5) prohibits employers from unfairly discriminating against a person on the grounds of his or her relevant experience.

This wide and generous definition of suitable qualification is designed to move away from a decontextualized centring of individual merit. Cognisant of past and persisting barriers to access equal educational opportunities and access to jobs, this definition makes clear the connection between the privilege of some groups, in particular, white males, and their ability to amass skills, experience and expertise. Referring to the over-representation of white persons in the South African Police Services’ senior positions, Mlambo JP in the Labour Appeal Court decision in Barnard captures this connection when he noted:

The over representivity of white males and females is itself a powerful demonstration of the insidious consequences of our unhappy past. White people were advantaged over other races especially in the public service. This advantage was perpetuated by the transfer of skills, some critical, to the same white race to the exclusion of others, especially blacks.

The leading criterion to determine equitable representation has been whether the workplace, at each occupational level, reflects the national and regional demographics of the economically active population. Another important provision is s 15(4). Section 15(4) prohibits measures which create an absolute barrier to ‘the prospective or continued employment or advancement of people who are not from designated groups’. In its jurisprudence, the Court, in Barnard, has held that the core difference between quotas and numerical targets is the flexibility of the latter and rigidity of the former. Numerical targets are ‘inclusive’ and ‘flexible employment guidelines’ while quotas are ‘rigid’ and amount to ‘job reservations’. This definition is

166 EEA, s 15(3).
167 IM Young Justice and the Politics of Difference (1990) ch 7 (Argues that there is no ‘objective’ ideal of what merit entails. It is largely defined to reflect the position and values of dominant groups in society).
169 EEA, s 42(a), in Correctional Services CC (note 17 above), the numerical targets in this case relied on national demographics. The Court held that both national and regional demographics had to be taken into account.
170 Barnard (note 17 above) at para 42.
171 Ibid at para 54.
172 Ibid. This approach was affirmed in Correctional Services CC (note 17 above) at para 51.
based on a reading of ss 15(3) and (4) of the EEA. According to the Court, the design or implementation of numerical targets in a manner that creates an absolute barrier converts permissible numerical targets into quotas. There must be a measure of flexibility. However, the requirement of flexibility is vague, giving rise to two key questions. First, in relation to what and for whom are affirmative action measures required to be flexible? Second, what purpose does flexibility serve?

A Flexibility in relation to what and for whom?

In response to the first question, two diverging approaches have emerged. The first approach, individualised flexibility, requires an assessment of the individual merit, skills, expertise and experience of persons beyond the suitable qualification threshold. The second approach is more general; flexibility for operational needs of the employer or the public interest is sufficient, the functional approach. As will be shown below, the former approach cannot be reconciled with the express provision for appointing suitably, rather than equally qualified candidates and the prohibition of discrimination based on a lack of experience. In fact, it seems to contradict these provisions.

1 The individualised approach: individual merit, skills and expertise

The first approach requires individualised flexibility. According to this approach, affirmative action measures which view persons through the lens of their group membership (based on status such as race, gender etc.) and fail to take individual merit, skills, expertise and experience are rigid quotas. This approach can be seen in two of the four judgments in Barnard. In Moseneke ACJ’s obiter remarks on whether the numerical targets, in that case, were flexible, he found that they were because there was an overrepresentation of white women at the salary level for which the applicant in that case applied and because of the fact that, by the time the case was heard by the Court, she had been promoted. For Moseneke ACJ, this was an indication that the employer had looked beyond its numerical targets and had not created an absolute barrier for the advancement of white women. In their concurring opinion in the case, Cameron et al. JJ provide a clearer picture of this flexibility requirement — the judges required the implementation of affirmative action measures to ‘at a minimum’ take account of ‘the relevant aspects of a candidate’s identity … To do otherwise would be to sanction rigidity that would convert the numerical targets specified in the Plan into impermissible quotas’.

Under the EEA, this approach is confusing because, on the one hand, the Court sanctions the suitable qualification standard, on the other, it requires individual merit to still be a factor in making decisions. While the Court explained the flexibility requirement as being aligned with the prohibition of an absolute barrier against non-beneficiaries appointment or advancement, these are two different things. Making ‘rigid’ appointment or promotion decisions based on numerical targets and without an assessment of individual merit beyond suitable qualification

173 Pretorius (2017) (note 31 above) argues in favour of this approach as it reflects, at least for him, the commitment to non-racialism and non-sexism.
174 Barnard (note 17 above) at paras 66–67.
175 Ibid.
176 Ibid at paras 118–119.
is not the same as barring the development of those adversely affected by such appointment or promotion. The difference between these can be seen in the actual findings in *Barnard*.

In *Barnard*, despite her better performance and score in the interview, the claimant was not appointed because of an over-representation of white women at the position for which she applied.\(^{177}\) While the judges took very different approaches, they all agreed that in light of the over-representation of white women for the position which Ms Barnard applied, the decision not to appoint her was justified.\(^{178}\) Arguably, while there is a pull towards the individualist approach, especially in Mosewaneke ACJ and Cameron et al.’s judgments, the judges were not able to reconcile this with the reality of the over-representation of white women. Thus, they all concluded that the lack of individualised flexibility, in this case, had been justified. This reflects some acknowledgement of the real impact of individualised flexibility — it would entitle adversely affected persons, even when they are over-represented, to an individual assessment of merit, skills and expertise that may lead to and justify their continued over-representation. That creating an absolute bar for appointments and promotions is different from a lack of individualised flexibility can more clearly be seen in Van der Westhuizen J’s concurring opinion in the case, he held:

Ms Barnard failed to secure appointment because there was over-representation of people from her designated group. Had this over-representation not been present, the policy would not be a bar — let alone an absolute one — to her (or any other similarly qualified white woman’s) appointment.\(^{179}\)

The quote above can be read as saying that the rigid application of numerical targets alone is not prohibited; it is the absolute barrier which is prohibited. Seen against the background of the right to dignity, creating an *absolute barrier* to the advancement of a group will likely be a disproportionate means of promoting the achievement of equality. However, rigidity, in the sense discussed above, does not per se create an absolute barrier to the advancement of non-beneficiaries. Otherwise, the decision not to appoint the claimant in *Barnard* would not have passed constitutional muster. But it did, even under the more rigorous ‘fairness’ standard applied by Cameron et al. JJ in that case.\(^{180}\)

2 *The functional approach: operational and other requirements*

The second approach accepts that flexibility is not related to the individual. In terms of this approach, the possibility of deviation for operational requirements is sufficient. This approach comes out of the Court’s second affirmative action case under the EEA, *Correctional Services*. In this case, Zondo J (writing for the majority) and Nugent AJ (concurring opinion) took different approaches to the kind of flexibility required to protect numerical targets from the damning label of ‘quota’. In this case, the impugned policy contained numerical targets and expressly provided for circumstances in which deviations from the numerical targets could be made. According to the policy, the National Correctional Services Commissioner (the Commissioner) could deviate from the numerical targets and appoint persons from non-beneficiary groups in the context of scarce skills and where there was no suitably qualified candidate from the beneficiary group.\(^{181}\) The measure also created sanctions for managers who failed to meet

\(^{177}\) Ibid at para 15.

\(^{178}\) Ibid at paras 66 (per Mosewaneke ACJ), 123 (per Cameron et al), 181 (per Van der Westhuizen J), 230 (per Jafra J).

\(^{179}\) Ibid at para 181.

\(^{180}\) Ibid at paras 76, 93–98.

\(^{181}\) *Correctional Services CC* (note 17 above) at para 7.
the numerical targets. One of the issues that the Court had to decide on was whether the possibility of deviation from the numerical targets in the circumstances above was enough to render the numerical targets sufficiently ‘flexible’ not to amount to impermissible quotas.

Before the Court, Zondo J held that the numerical targets were sufficiently flexible to not constitute quotas. For Zondo J, the possibility of deviation was not remote; deviations could happen in situations that ‘occur in reality’. In this case, he found the possibility of deviation for operational requirements as constituting a wide power of discretion. That deviations could only be made by the Corrections Commissioner, or that managers could be sanctioned for failing to implement the numerical targets was also not sufficient to convert the numerical targets into quotas.

In contrast, Nugent AJ adopted the individualist approach to flexibility. For Nugent AJ, affirmative action measures had to reach an appropriate balance between the interests of all those affected by them; they had to be ‘thoughtful, empathetic, and textured’. The plan in this case was ‘only cold and impersonal arithmetic,’ it had the ‘look, flavour and characteristics of quintessential quotas’. Following the argument in Barnard, the ‘look and flavour’ of quotas was the failure to take the individual circumstances of persons into account. For Nugent AJ, the possibility of deviation was separate from questions of the flexibility of the policy in individual cases, beyond the context of scarce skills or operational requirements. On Nugent AJ’s definition, a flexible plan required flexibility in all individual appointments. There had to be discretion in the individual implementation of the numerical targets. This discretion was tied to the ‘individual experience, application and verve’ of applicants.

Returning to the question considered in this paragraph, ‘in relation to what and for whom do we need flexibility?’ According to the Court, we should either be concerned with the individual circumstances, merit and skills of a person adversely affected by an affirmative action measure or with the operational requirements of an employer. As I have shown in the discussion above, the individualist approach does not fit with the other provisions in the EEA and, in practice, it could undermine the purpose of affirmative action measures under the EEA. Specifically, it renders the very purpose of preferential treatment and the threshold of suitable qualification under the EEA redundant. Zondo J’s functional approach kept these intact — allowing a deviation for operational requirements and prioritising advancing and protecting disadvantaged groups who meet the suitably qualified threshold in order to achieve the goals of the EEA. This is done without compromising the prohibition of measures which create an absolute barrier for the advancement of non-beneficiaries. Unfortunately, as the analysis of the lower court decisions in SARIPA will illustrate, the individualist approach was adopted and transplanted to s 9(2) of the Constitution.

182 Ibid at para 16.
183 Ibid at para 50.
184 Ibid at paras 50–64.
185 Ibid at para 53.
186 Ibid at paras 54, 60.
187 Ibid at paras 61–63.
188 Ibid at para 102.
189 Ibid at para 101.
190 Ibid at para 108.
191 Ibid at para 113.
192 Ibid at para 118.
B Flexibility for what purpose?

The second question that arises concerns the rationale behind the flexibility requirement. Under the individualist approach to flexibility, the argument seems to be that the lack of flexibility in quotas, in particular, the failure to take individual merit, skills and characteristics beyond suitable qualification and group membership into account violates the right of non-beneficiaries to dignity and is a form of unfair discrimination.193 Agreeing with this assessment, Pretorius criticises Zondo J’s ‘definitional approach’ and argues that the failure to take individual characteristics into account gives ‘insufficient regard to the nature of the impact of the exceptions on the dignity of those affected’,194 this, according to Pretorius, does not accommodate ‘all the implicit considerations of an inclusive notion of substantive equality’.195 The core of this argument appears to be that more than other forms of affirmative action, quotas disregard the individual rights of non-beneficiaries, leading to the foreclosure of opportunities for the innocent individual.

In addition to the argument that quotas cause harm to the non-beneficiaries or adversely affected disadvantaged groups, the ‘quota candidates’ are said to experience harm because when affirmative action measures are applied rigidly, they are disadvantaged by the ‘invidious and usually false inference’ that they have been appointed because of their membership of a disadvantaged group and not on account of their individual merit.196

In this part of the article, I have hopefully illustrated how the individualist definition of quotas and the reasons underlying their prohibition is based on the assumption that quotas necessarily create an absolute barrier — which violates the right to dignity. However, this need not be the case. There is a difference between rigidly applying numerical targets to achieve a specific outcome and measures which exclude and create an absolute barrier. As will be argued in the context of s 9(2) of the Constitution, rather than protect the right to dignity, the real effect of the individualist approach to quotas and their absolute prohibition under the EEA is that the effect opens the possibility of subordinating the purpose of redressing group-based disadvantage and fulfilling the rights to equality and dignity of disadvantaged groups with individual merit. That this contradicts the definition of suitably qualified in the EEA and the purpose of this statute is something that the Court will have to resolve. My focus in this article is on s 9(2) of the Constitution and the transplanting of the arguments under the EEA to prohibit quotas under s 9(2). Before making a positive argument to explain why quotas can be permissible affirmative action measures under s 9(2), the next part of this article closely examines the judgments in the SARIPA case.

IV EXTENDING THE PROHIBITION OF QUOTAS TO S 9(2) OF THE CONSTITUTION

The question whether quotas are permissible under s 9(2) of the Constitution came to the fore in the SARIPA case. The High Court and Supreme Court of Appeal (SCA) answered this in the affirmative, both courts extended the prohibition of quotas in the EEA to s 9(2) of the Constitution. Before the Court, the majority judgment did not engage with the lower court’s

193 Ibid at paras 117, 133 (per Nugent J).
195 Ibid 281.
196 Barnard (note 17 above) at para 80.
findings on the impermissibility of quotas. As will be seen below, while Madlanga J’s dissent cast some doubt on the lower court findings, he did not make any definitive findings on the permissibility of quotas under s 9(2) either.

A The salient facts of SARIPA

The SARIPA case concerned a policy which sought to regulate the appointment of provisional trustees to control and administer insolvent estates and commercial entities before the appointment of the final trustees at a meeting of the creditors. The case was rooted in an apparent conflict between two provisions of the Insolvency Act, 1936 (the Insolvency Act), ss 18 and 158(2). Section 18 of the Insolvency Act empowers the Master of the High Court (the Master) to appoint a provisional trustee in terms of a policy determined by the Minister under s 158(2) of the same legislation.

Under the impugned s 158(2) policy, the Master would have to appoint suitably qualified insolvency practitioners using an alphabetised list. The list created four categories in accordance with race, gender and date of citizenship. The policy ranked the different beneficiaries in four categories:

i. Category A of the Minister’s policy consisted of Black women who became South African citizens before 27 April 1994;

ii. Category B consisted of Black men who became South African citizens before 27 April 1994;

iii. Category C consisted of white women who became South African citizens before 27 April 1994 and;

iv. Category D consisted of Black men and women, white women, who became South African citizens on or after 27 April 1994 and white males regardless of when they became citizens.

Based on the four categories, the policy required appointments to be made in the ratio A4: B3: C2: D1. The letters represented the racial and gender categories, while the numbers represented the number of practitioners who should be appointed in each category. The list also separated junior and senior practitioners based on their relative experience. The date of citizenship is significant because it marks the beginning of the democratic dispensation. In separating the groups based on the date of citizenship, the policy prioritised Black women and men as well as white women (in that order) who were citizens before the democratic transition but treated all Black persons who were citizens after this date, the same as all white males.

The policy allowed for a deviation from the list system where the complexity of the matter and the suitability of the insolvency practitioner next in line required the joint appointment of a senior insolvency practitioner and the next junior or senior practitioner from the list. It was thus possible for the Master to appoint a person other than the next practitioner on the list. Thus, similar to the Correctional Services case, the deviation from the list for operational needs of the estate was possible.

197 SARIPA HC (note 26 above) at para 45. I use the term insolvency practitioners to refer to trustees, liquidators as well as other practitioners under different statutes regulating insolvency.

198 Ibid at paras 30–43 (For a summary of the relevant statutes).

199 SARIPA CC (note 16 above) at para 20.

200 Ibid at para 23.

201 SARIPA HC (note 26 above) at para 55.

202 SARIPA CC (note 16 above) at para 25.
Before its implementation, the policy was challenged in two High Courts. Before the Western Cape High Court, the South African Restructuring and Insolvency Practitioners Association, an organisation acting on behalf of insolvency and business rescue practitioners (SARIPA), brought two applications against the Minister and the Chief Master of the High Court of South Africa. Part A of the application sought an interdict to the implementation of the policy. Part B was a review of the policy’s constitutionality. The Association for Black Business Rescue and Insolvency Practitioners of South Africa intervened in this application and took part in the hearing of Part A, seeking the opposite relief to SARIPA. The Western Cape High Court granted the interdict pending the determination of Part B. Before the North Gauteng High Court, the Concerned Insolvency Practitioners Association (CIPA), a voluntary organisation of practising insolvency practitioners, brought a challenge seeking a declaratory order to the effect that the policy is unconstitutional. The National Association of Managing Agents and the trade union solidarity intervened in this application. By agreement, Part B of the SARIPA application and the CIPA application (the Applicants) were heard together by the Western Cape High Court.

The Applicants challenged the impugned policy on several grounds, including, that the Minister had exceeded his powers in fettering the Masters’ discretion; that it violated the right to equality; and that it was arbitrary and irrational. In support of the policy, the Minister argued that it was an affirmative action measure in line with s 9(2) of the Constitution and that it complied with Moseneke J’s three-pronged test in Van Heerden. According to the Minister, the policy ‘would facilitate access to the industry and restore the previously disadvantaged insolvency practitioners’ rights to equality, dignity and would also realise their right to follow their trade, profession or occupation’. There were several findings made by the different courts in this case. For purposes of this article, I focus on the findings that the policy violated the right to equality and dignity and was arbitrary and irrational because it was a rigid quota, starting with Katz AJ’s Western Cape High Court judgment.

B The High Court judgment

It will be recalled that the Van Heerden test is a three-pronged inquiry into the validity of affirmative action measures. The first leg of the test requires the measure to target persons or categories of persons disadvantaged by unfair discrimination. The second requires the measure to be designed to promote and advance the intended beneficiaries and prohibits irrational and arbitrary measures. The last leg requires the measure to further the achievement of equality. The policy passed the first leg of inquiry, with Katz AJ finding that there was a need to transform the insolvency industry and that the policy targeted a class that has been disadvantaged by unfair discrimination. In the second leg of the inquiry, he held that the

203 SARIPA HC (note 26 above) at para 12.
204 Ibid at para 15.
205 Ibid at para 16.
206 SARIPA HC (note 26 above) at para 17.
207 Ibid at paras 19 and 20.
208 Ibid at para 22.
209 Ibid at para 7.
210 Ibid at para 71.
211 SARIPA SCA (note 25 above) at para 24.
212 SARIPA HC (note 26 above) at para 138.
court had to determine whether the policy was rationally related to its purpose, improving the position of historically disadvantaged groups.213

The Minister argued that the policy was rationally related to its purpose because, by intervening in the provisional appointment of insolvency practitioners, the policy would ensure that disadvantaged persons had exposure, enabling them to develop the skill and reputation necessary to build successful practices. According to the Minister, given the opportunity to demonstrate their skill at the provisional stage, the creditors would ultimately appoint them at the final stage, gradually transforming the insolvency industry.214 In response, the Applicants argued that the policy prevented the Master from having regard to the skills, knowledge and expertise of practitioners, which would lead to the appointment of unsuitable candidates and the entrenchment of current patterns of exclusion as creditors would not want to nominate the ‘unsuitable’ provisional practitioners.215 Essentially, the Applicants rejected the suitable qualification standard set by the Minister and offered a definition that required ‘a proper match between the sector specific expertise of an individual practitioner and the estate’.216 They also argued that the list system was a rigid quota.217 Deciding in favour of the Applicants, Katz AJ provided three reasons to explain why the policy was arbitrary and irrational.

First, he held that there was insufficient evidence to show that the policy would lead to an increase in the appointment of disadvantaged groups. In this regard, he held that a policy seeking to transform the insolvency industry had to do more than increase numbers, there had to be a match between ‘individual skill and the requirements of the role’.218 Katz AJ buttressed the need for a higher threshold of suitable qualification by pointing at the harm the policy would cause to the qualified disadvantaged persons ‘who have managed to establish themselves in the industry’.219 This group, according to the court, would lose out from being rewarded for their excellence.220 Instead, he preferred ‘progressive’ measures that would incrementally increase the skill and expertise of disadvantaged practitioners.221 Further, he held that because there was no time limit to the policy, it was difficult to determine whether the policy was likely to achieve its outcome.222 Another basis for the lack of evidence was that, according to Katz AJ, the Minister had not adduced evidence to show that the ‘mechanical appointments can, in fact, change nomination behaviour by creditors’.223 He characterised the policy as a ‘hope’ rather than a reasonable likelihood.224 He also argued that there were too few insolvency practitioners from disadvantaged groups to populate the Master’s list.225

Second, he rejected the statistical evidence that the Minister relied on to underlie the policy. The Applicants disputed the accuracy of the evidence relied on to found the policy.226 Because

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213 Ibid at para 144.
214 Ibid at para 149.
215 Ibid at para 154.
216 Ibid at para 155.
217 Ibid at para 137.
218 Ibid at para 156.
219 Ibid at para 157.
220 Ibid at para 158.
221 Ibid at para 160.
222 Ibid at para 161.
223 Ibid at para 162 (own emphasis).
224 Ibid.
225 Ibid at para 163.
226 Ibid at paras 166–176.
of ‘significant gaps’ and ‘inaccurate information’ relied on by the Minister, especially in relation to the lists that would be used by the Master, he held that the discrepancies in the list diminished the likelihood of the policy achieving its purpose.

Third, he held that the policy amounted to a rigid quota. The Applicants made this argument in two parts. The first was a challenge to the use of the status of race and gender as proxies for disadvantage. The second was that even if the classifications were valid, they were rigid in form and their implementation. Concerning the first argument, the Applicants challenged the use of racial classifications as proxies for disadvantage, arguing that these classifications amounted to ‘racial norming’ rather than act as ‘flexible proxies for disadvantage’. In response to this argument, Katz AJ held that ‘divorced from other contextual factors’ the use of racial classifications was ‘an arbitrary threat to the dignity and autonomy of individuals’. However, he dismissed the argument on the basis that these classifications were also used under black economic empowerment and employment equity legislation, concluding that it was not open for the court to determine whether the categories used were themselves arbitrary and irrational. However, he found the measure to amount to ‘an inflexible and rigid roster system’ which had the effect of arbitrarily redistributing work. This finding was based on two reasons: first, he held that quotas were contrary to the goal of achieving equality and second, he held that the rigidity of quotas violated the right to dignity of the non-beneficiaries of affirmative action. In relation to the first argument, Katz AJ found that there was a tension between achieving the goals of equality and the use of quotas as they do not allow for competition in the insolvency industry, he thus noted:

As a matter of logic, all practitioners operating in the insolvency environment should ultimately be able to obtain work on an equitable basis (which must, in the long term be related to the requirements of the work and the nomination practices of creditors). For a measure to effectively assist all practitioners in equitably competing for appointment requires something more than inflexible allocations.

Second, similar to the approach under the EEA, Katz AJ held that the rigid implementation of the policy’s ratios did not leave scope for considering the skills, knowledge, expertise and experience of individual candidates. Accordingly, it violated the dignity of both the beneficiaries of the measure and the excluded groups, specifically the white males in Category D. According to Katz AJ:

Such harm to the core value and right of dignity is the product of a measure which elevates race and gender as absolute categories without any regard to individual characteristics or the context in which appointments must take place. A scheme of this nature does violence to the notion of

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227 Ibid at para 177.
228 Ibid at para 180.
229 Ibid at para 81.
230 Ibid at para 182.
231 Ibid at para 192.
232 Ibid at para 191.
233 Ibid at paras 192–193.
234 Ibid at para 194.
235 Ibid at para 195.
236 Ibid at para 180.
237 Ibid at para 199 (own emphasis).
238 Ibid at para 215.
239 Ibid.
transformation from a racist, racialised, sexist and gendered past to a non-racial and non-sexist future.\textsuperscript{240}

For Katz AJ, the commitment to non-racialism and non-sexism required individual skill and expertise to be approached from a neutral perspective. The context within which individual skills and expertise was amassed was not relevant to whether and the extent to which, beyond suitable qualification, it should matter. Thus, in relation to the white males, Katz AJ argued that the ratios implicated their right to work and inherent dignity.\textsuperscript{241} Essentially, what separates a permissible numerical target from an impermissible quota under s 9(2) of the Constitution, as under the EEA, was flexibility, individualised flexibility. The policy in SARIPA, according to Katz J, used race and gender categories which created silos ‘which overly privilege[s] race and sex at the expense of all other relevant characteristics’.\textsuperscript{242} In addition to dignity harm to the non-beneficiary class, Katz AJ also found that the use of quotas could cause harm to the interests of the intended beneficiaries of affirmative action. He reasoned that quotas create ‘the impression that appointments are due only to race and exclusive of merit’.\textsuperscript{243}

Katz AJ concluded his judgment with the observation that, in light of the history of ‘state-sponsored racism and sexism, race and gender will always be significant factors when considering the right to equality’.\textsuperscript{244} However, as will be apparent later in the article, his judgment did the exact opposite. Katz J’s judgment ushered in a refocus on individual merit that will only have the consequence of entrenching existing patterns of disadvantage in favour of historically privileged groups — albeit in the name of preserving dignity.

\section*{C No refuge for quotas: The Supreme Court of Appeal and Constitutional Court judgments}

\subsection*{1 The Supreme Court of Appeal judgment}

Mathopo J’s majority opinion in the SCA affirmed Katz AJ’s findings on the impermissibility of quotas under s 9(2) of the Constitution. According to Mathopo J, advancing employment equity and transformation required flexibility and inclusiveness.\textsuperscript{245} ‘Rigidity in the application of the policy which has the effect of establishing a barrier to the future advancement of such previously advantaged insolvency practitioners is frowned upon and runs contrary to s 9(2) of the Constitution.’\textsuperscript{246} This was because quotas are a form of arbitrariness or naked preference that was prohibited under the second leg of the \textit{Van Heerden} test.\textsuperscript{247} Further, he held that quotas unjustifiably encroach ‘upon the human dignity of those affected by them’.\textsuperscript{248}

Dismissing the argument that the policy allowed for deviations and was thus flexible enough to escape the classification as an impermissible quota, Mathopo J began by acknowledging that the policy in this case, ‘was almost identical’ to the policy in the \textit{Correctional Services} case.\textsuperscript{249}

\begin{flushright}
\textsuperscript{240} Ibid.
\textsuperscript{241} Ibid.
\textsuperscript{242} Ibid at para 216.
\textsuperscript{243} Ibid at para 205.
\textsuperscript{244} Ibid at para 228.
\textsuperscript{245} \textit{SARIPA} SCA (note 25 above) at para 29.
\textsuperscript{246} Ibid.
\textsuperscript{247} Ibid at para 32.
\textsuperscript{248} Ibid.
\textsuperscript{249} Ibid at para 35.
\end{flushright}
However, he distinguished the policy in *Correctional Services* from the policy in the present case by holding that the discretion to deviate from the plan in *Correctional Services* was ‘general’ and allowed for some discretion, in this case, it was not.\(^{250}\) It is not clear why the assessment of whether an estate is so complex that the next insolvency practitioner in line is not suitable, is not ‘general’ discretion. There is no difference between the nature of the deviation in *SARIPA* and the policy in *Correctional Services* — it is pretty clear that the real issue lay with the kind of deviation possible in this case — one not related to individual skills, merit and expertise. Accordingly, while Mathopo J purported to endorse Zondo J’s approach in *Correctional Services*, he, in fact, aligned with the individualised approach, the policy was too rigid because it failed to take the individual circumstances of insolvency practitioners into account.

As further proof that the policy was arbitrary and irrational, Mathopo J found that the policy was capricious because it was formulated without reference to its impact. In this regard, he argued that because there were more white males in the insolvency practice than all the other groups’, white males (who would receive one of every ten appointments) would prejudice this group and young practitioners.\(^{251}\) In addition, Mathopo J pointed at the fact that the policy had no mechanism to allow a practitioner to refuse an appointment. Given the few practitioners in Category A, who would be allocated 40 per cent of the work, he worried that it was unclear what they would do if they were too busy to take on work.\(^{252}\) He thus concluded that the likely effect of the policy would ‘be to force many insolvency practitioners in category D, or category C, out of the profession and deter others, especially the young, from entering it.’\(^{253}\)

2 The Constitutional Court judgments

The majority decision in the Court did not engage with whether quotas were impermissible under s 9(2) of the Constitution.\(^{254}\) Instead, applying the *Van Heerden* test, Jafta J found the policy unconstitutional for failing the second leg of *Van Heerden*. In contrast, Madlanga J’s dissent casts some doubt on this absolute prohibition. It takes a markedly different approach to the analysis of the impact that the measure has on the non-beneficiaries of affirmative action.

**aa** The majority judgment

Similar to Katz AJ’s finding in the High Court, Jafta J held that the policy failed the second leg of the test because ‘from the information on record’ the policy was not likely to transform the insolvency industry.\(^{255}\) This was because it was not clear whether there was a single list or how it would be applied by the Masters in each court or if they would have their own list. Because of this ‘paucity of information’ in relation to the implementation of the policy, it could not be said that the policy was likely to achieve the stated goal.\(^{256}\) Further, Jafta J held that the most ‘serious defect’ was in relation to Category D which lumped Black males and females who became citizens on or after 27 April 1994 with all white males and white females born on or after 27 April. Because white males would be the majority of this group the allocation of

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\(^{250}\) Ibid.

\(^{251}\) Ibid at para 36.

\(^{252}\) Ibid at para 37.

\(^{253}\) Ibid.

\(^{254}\) Jafta J simply summarises the findings in the lower court judgments, *SARIPA CC* (note 16 above) at paras 10–14.

\(^{255}\) Ibid at para 40.

\(^{256}\) Ibid.
one appointment would disadvantage the ‘young’ in favour of white males and the status quo would be retained as most appointments would go to them.\textsuperscript{257} Thus, he held that the policy perpetuated the disadvantage it purported to eradicate, discriminating against races on the basis of when they obtained their nationality, specifically those who fell under the groups that s 9(2) sought to advantage.\textsuperscript{258} In relation to the third leg of the Van Heerden test, Jafta J seemed to confuse the second and third leg, holding that the second leg was also concerned with ‘the reasonable likelihood that the restitutionary measure concerned would achieve the purpose of equality’.\textsuperscript{259} But then he alluded to this leg being about the impact that the measure has on those adversely affected, noting that ‘it is inevitable that those who were previously advantaged would be affected adversely. This is the price demanded by the Constitution to remedy the injustices of the past order and to attain social justice’.\textsuperscript{260}

Overall, Jafta J concluded that, under s 9(2), the facts on record did not show that the policy was likely to achieve equality.\textsuperscript{261} It is disappointing that Jafta J missed the opportunity to bring clarity on whether quotas fell within the scope of permissible s 9(2) measures. In contrast, while he did not make any definitive findings, Madlanga J’s dissenting judgment cast doubt on the constitutional impermissibility of quotas. Further, his overall analysis gave more deference to the Minister and placed the impact that the measure would have on white male insolvency practitioners in context. In recognition of the adverse impact the policy would have on the ‘younger’ Black insolvency practitioners in Category D, rather than strike down the policy on this basis, he opted for a remedy that would preserve the affirmative action measure and protect against entrenching patterns of disadvantage — severing Category D from the policy.\textsuperscript{262}

bb The dissenting judgment

Madlanga J began his judgment by noting that the reason why white people continued to be disproportionately better qualified and more experienced was ‘a function of the subjugation of black people and their exclusion from accessing equal opportunities through centuries of colonialism and apartheid’.\textsuperscript{263} He characterised the policy as one step ‘in the tortuous, long road towards the attainment of substantive equality’.\textsuperscript{264} While agreeing with the majority that the Category D classification was constitutionally invalid, he chose to sever this clause and preserve the impugned policy.\textsuperscript{265} Of importance to this article is his scepticism towards the need for flexibility; his analysis of the nature of the impact that the measure had on white males; and the question whether quotas fell outside the scope of s 9(2) of the Constitution.

Responding to the argument that the policy displaced the discretion of the Master, he reasoned that the preservation of discretion and the need for flexibility worked to preserve the status quo, removing such discretion through policies such as the one in the case eliminated the possibility of unfair and unjustified preference.\textsuperscript{266} Essentially, the absence of discretion

\textsuperscript{257} Ibid at para 41.
\textsuperscript{258} Ibid at para 42.
\textsuperscript{259} Ibid at para 46.
\textsuperscript{260} Ibid.
\textsuperscript{261} Ibid at para 48.
\textsuperscript{262} SARIPA CC (note 16 above) at para 70.
\textsuperscript{263} Ibid at para 63.
\textsuperscript{264} Ibid at para 64.
\textsuperscript{265} Ibid at para 70.
\textsuperscript{266} Ibid at para 77.
could further the purpose of redressing group-based disadvantage. Moreover, he pointed out that the ‘flexibility’ standard required something more than the requirement of the suitable qualification. If this approach was accepted, he reasoned that the fact that white people, in particular, white males were more likely, as a ‘function of previous naked racist preferences and exclusion of other groups from acquiring skills and opportunities’ to meet the threshold beyond suitable qualification meant that the flexibility standard was designed to preserve their interests. According to him, if redressing the unequal redistribution of work was taken seriously; there was no need to leave room for the appointment of the more than just ‘suitably qualified’ candidate.

Under the heading ‘Quotas, impermissible rigidity and arbitrariness’, Madlanga J expressed a measure of reservation about Mathopo J’s finding that rigid quotas were constitutionally impermissible. While he found it unnecessary to engage in a debate on whether ‘under section 9(2) — quotas are similarly outlawed,’ he held that ‘before invalidating a measure meant to achieve substantive equality for being rigid, it must be looked at in context or in a “situation-sensitive” manner. It can never be a one-size-fits-all.’ As an example of such an approach, he considered Van Heerden and Correctional Services as cases in which rigidity could have completely foreclosed the possibilities and opportunities for the disgruntled applicants in those cases. In the SARIPA case, he argued that the policy had been limited in its application to provisional appointments, while elsewhere, white males would continue to dominate the insolvency industry.

In response to the argument that the policy would lead to the closure of the practices of white insolvency practitioners, he referred to the impact that maintaining the status quo had on disadvantaged practitioners. They ‘cannot even begin truly to make a living in this area of practice’ and those excluded from entry because of the dominance of white practitioners. Further, he held that the policy did not unduly invade the human dignity of those affected by them because they continued to benefit at the final stage of appointment. In this regard, he critiqued the failure to consider the ‘indisputable reality of the domination of the final stage by white practitioners’, for him the disadvantage caused by the policy was compensated in that the industry remained unaffected at the final stage of appointment.

Referring to Van Heerden, he reiterated that just because a measure had an adverse impact on a non-beneficiary group did not mean that it was unconstitutional. Madlanga J questioned not only the extent of the adverse impact on white male insolvency practitioners but also the fact of the existence of a disadvantage in this case. Thus he explained his use of ‘perceived disadvantage’ as a reference to the fact that there is no ‘justification for white people, a small minority, to disproportionately dominate most professions and industries, including insolvency practice’ as did in South Africa. In this regard, he held that the goals of achieving equality

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267 Ibid at para 78.
268 Ibid.
269 Ibid at para 79.
270 Ibid at para 80.
271 Ibid.
272 Ibid at para 83.
273 Ibid at para 81.
274 Ibid at paras 83–84.
275 Ibid at para 81.
would move at a snail pace if the focus was on the disadvantaged caused to those affected.\textsuperscript{276}

Thus, he held:

If, for the practices of white insolvency practitioners to continue in existence, it is necessary that white people as a group must not only continue to disproportionately dominate insolvency practice at the final stage but must also derive more benefit than what the policy has given them, then tough luck.\textsuperscript{277}

Referring to the majority’s finding that the measure failed the second and third leg of the \textit{Van Heerden} test because of the paucity of information on whether there would be one list or different lists applied by each Master, he held the opposite, finding that:

Manifestly in time the measure must, and will, transform the insolvency industry. It affords section 9(2) beneficiaries significant advantage, albeit in varying degrees. Properly applied I do not see how that significant advantage cannot eventually uplift these beneficiaries to a point where the industry will be transformed. That to me is so plain as to require no explanation from the applicants.\textsuperscript{278}

The quote above is a gesture that the majority had applied a higher threshold than the ‘reasonable likelihood’ standard required under the \textit{Van Heerden} test. He thus notes:

The future cannot always be predicted with precision; and that is an understatement. As Van Heerden tells us, ‘the future is hard to predict’. And ‘[t]o require a sponsor of a remedial measure to establish a precise prediction of a future outcome is to set a standard not required by section 9(2). Such a test would render the remedial measure stillborn and defeat the objective of section 9(2).’ Courts must exercise caution before knocking down measures calculated to redress the inequality of the past.\textsuperscript{279}

In all the judgments in this case, Madlanga J’s dissenting opinion was the only judgment which did not accept the argument for the absolute impermissibility of quotas. While he did not explore this, it is clear from his reasoning that he did not consider rigidity to necessarily violate the right to dignity of non-beneficiaries of affirmative action. Unlike the other judgments in the case, he placed the policy and its impact within the context of past and persisting inequalities — something almost absent in the other judgments. The paragraph below takes the baton from Madlanga J and argues that quotas, however rigid, can pass the s 9(2) threshold in the Constitution, in particular, they do not necessarily violate the dignity of the beneficiaries and non-beneficiaries of affirmative action.

V \hspace{1em} NOT ALL QUOTAS: A SITUATION-SENSITIVE APPROACH TO QUOTAS

So far in the article, I have reiterated the relatively non-controversial point that s 9(2) permits positive redistributive measures that realise the right to equality and dignity of historically disadvantaged groups, including affirmative action. These measures are a part of the guarantee of equal protection and benefit of the law in s 9(1); they do not attract the presumption of unfairness in s 9(5); they need not be shown to be fair discrimination under s 9(3) as per the \textit{Harksen} test. However, taking into account the adverse impact that these measures could have on the rights, in particular the right to dignity of those adversely affected, these measures must meet the internal threshold in s 9(2), the \textit{Van Heerden} test.

\textsuperscript{276} Ibid at para 82.
\textsuperscript{277} Ibid at para 83.
\textsuperscript{278} Ibid at para 89.
\textsuperscript{279} Ibid at para 90.
I have argued that the Van Heerden test is a species of proportionality assessment designed to fit the context of affirmative action. The proportionality assessment under s 9(2) is relatively more deferent than ‘traditional’ proportionality assessment. In addition, unlike the fairness assessment under Harksen, the focus is on the important purpose served by these measures. The balancing under this test is concerned with questions of unequal power and relative advantage and disadvantage between affected groups, as Albertyn summarises, it ‘is a contextual enquiry that looks at the issue holistically and should comprehend the structures of advantage and disadvantage that underpin the measure or decision’. Thus, when balancing the competing rights that arise in affirmative action cases, in particular, the right to dignity, these rights must be understood in context. In relation to the right to dignity, I argued that both the collective and individual conceptions of dignity have to be understood against the context of past racial and other forms of subordination, domination and oppression. From this, I have argued that measures which create or entrench patterns of disadvantage, which demean or treat persons as a part of an ‘underclass’ or mark them as inferior, cannot pass the s 9(2) threshold. This is a high threshold, one which fully aligns with the prohibition of measures which ‘impose such substantial and undue harm on those excluded from its benefits that the long-term constitutional goal would be threatened’. In the employment context, I noted that one example of ‘substantial and undue harm’ is a measure which creates an absolute barrier or excludes persons from entering into, or advancing in a profession or trade.

I then explored the definition of and prohibition of quotas under the EEA. In this regard, I showed that the individualised approach to quotas contradicts and undermines provisions in the EEA. In particular, provisions which permit the preference of suitably, rather than equally qualified persons. Nevertheless, in the previous section, I explored the SARIPA case and showed that, drawing on the EEA jurisprudence, the lower courts in SARIPA have adopted the individualised approach. The analysis of the case law and accompanying academic commentary revealed that the rationale for the prohibition of quotas is that they are arbitrary and irrational and that they violate the right to dignity of the beneficiaries and non-beneficiaries of affirmative action.

In this part of the article, I argue that quotas can pass muster as permissible affirmative action measures under s 9(2) of the Constitution. In particular, I argue that quotas which target disadvantaged groups, advancing and protecting these groups through their preference in the allocation of resources, are not inherently irrational, arbitrary, or capricious and do not necessarily violate the dignity of the beneficiaries and non-beneficiaries of affirmative action. Essentially, there is scope for the permissible use of quotas under s 9(2) of the Constitution.

As a point of departure, the arguments that follow rest on the assumption that, accepting the individualised definition of quotas extensively discussed in the preceding two sections, the impugned policy in SARIPA was a quota under the individualised approach. The policy required the appointment of the next suitably qualified candidate on the list using the ratio of A:4; B:3; C:2 and D:1. Deviations were only allowed to meet the needs of specific estates. While allowing for flexibility, this flexibility was not tied to the skills, experience and expertise of individual insolvency practitioners in each case. These only became relevant in relation to

281 Ibid at 730.
282 Van Heerden (note 7 above) at para 44.
the needs of a complex estate and where the next eligible practitioner, in the opinion of the Master, could not be said to meet to suitable qualification threshold.

This article is inspired by Madlanga J’s dissent and suggests how he could have argued the case for the permissibility of quotas, including the impugned policy in SARIPA. It attempts the contextual, ‘situation-sensitive approach’ he alludes to in his dissent. Thus, in making the argument for quotas, the paragraphs that follow examine the SARIPA case under all three legs of the Van Heerden test — illustrating problems with the way in which the judges approached this case in their incorrect application of the Van Heerden test and their assumption that the rigidity of quotas are necessarily arbitrary, irrational, capricious and destructive towards the right to dignity.

A Does the measure target disadvantaged groups?

The first leg of the Van Heerden inquiry is concerned with the demarcation of the beneficiaries of these measures and requires ‘a comparison between affected classes’, the beneficiary class and the excluded class. While this is one of the most contested questions in the academic literature on affirmative action, under s 9(2) of the Constitution, this leg of the test has not been a significant hurdle in the court’s affirmative action jurisprudence. Because of the history of racial and patriarchal domination and oppression in South Africa, race and gender are salient classifications; but they are not the only possible markers of disadvantage. Under the EEA, the beneficiary groups are classified using race, gender and disability status.

This leg of the test does not require that all disadvantaged groups should be advanced or even that all disadvantaged groups should be advanced in the same manner. However, there must be sufficient basis to show why a specific group is being advanced; this is particularly the case when there is an overlap in the nature of the disadvantage that s 9(2) seeks to redress between different groups.

The classification in SARIPA was based on race, gender and citizenship. The policy prioritised Black women who were citizens at the time of the democratic transition, they

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283 Ibid at para 39.
285 Barnard (note 17 above) Mosenene ACJ identifies race, gender and class as markers of disadvantage and division in South Africa noting that, ‘At the point of transition, two decades ago, our society was divided and unequal along the adamant lines of race, gender and class’ at para 27; and Cameron et al JJ who note that ‘For reasons of history, racial and gender disadvantage are the most prominent. But they are not the only. They do not exclude other signifiers of disadvantage, like social origin or birth’ at para 76.
286 See Molala & Another v University of Natal 1995 3 BCLR 374, 1995 SACLRR 256 (The court upheld a measure which targeted and preferred African as opposed to Indian persons for medical school admissions. The court accepted the relative educational disadvantage of Africans when compared to Indians as a basis for the specific targeting of Africans for admission).
would receive four of every ten allocations by the Master.287 On the evidence provided by the Minister, the race and gender classifications were based on the level of under-representation of each group in the allocation of work.288 Overall, the race and gender classification easily met this threshold. None of the judgments rightly disputed this fact.289 The problem was with the use of citizenship as a classification. The question being whether the classification was under-inclusive for excluding ‘young’ insolvency practitioners from the first three classes of beneficiaries, leaving them to ‘compete’ with all white males in Category D. The different courts dealt with this question in the second leg of the inquiry.290

B Does the measure protect and advance disadvantaged groups?

The second leg of the Van Heerden test requires that measures be designed to advance and protect disadvantaged groups. Under this leg, there must be a rational connection between the affirmative action measure and its purpose. This is a low threshold, affirmative action measures must not be ‘arbitrary, capricious or display naked preference’.291 So long as there is a degree of fit between the group sought to be advanced, the measure and its remedial purpose, this leg will be met.292 This reading is supported by Moseneke J’s statement that, ‘The text requires only that the means should be designed to protect or advance. It is sufficient if the measure carries a reasonable likelihood of meeting the end’.293

The low threshold gives room for experimentation in the design and implementation of affirmative action measures because, as the Court acknowledged, affirmative action measures are directed at a future outcome, a future that is hard to predict.294 Thus, ‘To require a sponsor of a remedial measure to establish a precise prediction of a future outcome … would render the remedial measure stillborn and defeat the objective of section 9(2)’.295

Applying this to SARIPA, the approach taken in the lower courts, and Jafta J’s majority before the Court, was not in line with this threshold. In particular, there are two problems in the application of this leg in SARIPA. First, the courts ask for a much tighter fit between the policy and its effects on the intended beneficiaries, much more than a reasonable likelihood of success. Second, as further proof of irrationality and arbitrariness, Katz AJ makes a flawed assumption about the stigmatic harm of the measure to its intended beneficiaries. I turn to these below.

1 More than reasonable likelihood

In the High Court, Katz AJ required a much higher standard than rationality at this leg and placed a very high evidentiary burden on the Minister to show that the policy would in fact have the impact of advancing the beneficiaries of the impugned policy. While he began the

287 SARIPA CC (note 16 above) at para 20.
288 SARIPA HC (note 26 above) at para 167.
289 Ibid at para 138.
290 SARIPA CC (note 16 above) at paras 40–42; SARIPA SCA (note 25 above) at paras 36–37.
291 Van Heerden (note 1 above) at para 41.
293 Van Heerden (note 7 above) at para 42.
294 Ibid at para 41.
295 Ibid at para 42.
assessment by noting that what needed to be shown was whether the policy adopted a rational formulation which was capable of meeting the impugned policy’s objectives and promoting the achievement of equality,²⁹⁶ his analysis required much more. Further, Katz AJ assumes stigmatic harm on the intended beneficiaries of the impugned policy.

First, Katz AJ found that there was insufficient evidence to show that there was a rational link between the policy and its purpose by suggesting that the only kind of policy which would be able to achieve this purpose was a policy which matched individual skill and expertise with the needs of an estate, thus he held:

Insofar as the Policy aims to make the insolvency industry accessible to previously disadvantaged individuals, it needs to do more than increase numbers, but ensure that there can be a match between individual skill and the requirements of the role within the system provided for by legislation.²⁹⁷

There are two problems with this analysis. First, the quote above is not an inquiry into whether there is a rational link between the policy and its purpose or whether the policy is reasonably likely to achieve its purpose — it is a comparison between the impugned policy and what Katz AJ contemplates would have been a better policy. As argued earlier in the article, while it is a species of proportionality, the Van Heerden test does not require an enquiry into whether there is a less restrictive means to achieve the goal of the affirmative action measure. Second, Katz AJ’s requirement of a link between the individual skill of a practitioner and an estate misses the point of the policy. Most of the practitioners with skill and expertise would belong to the historically privileged group in this field, white males. Thus, his suggested policy is one which would likely entrench rather than redress the unequal distribution of work, completely undermining what the impugned policy sought to achieve.

The second factor that he relied on to justify a lack of evidence that the policy was rational was that it did not have a time-limit.²⁹⁸ There is no requirement that measures under s 9(2) should have an express time-limit. As Madlanga J found in his dissenting opinion before the Court, when the goals of the impugned policy have been achieved, there will be no need to retain the policy and ‘any person adversely affected by the continued application of the policy may well be entitled to bring an equality challenge to invalidate the policy. None of this affects the validity of the policy today’.²⁹⁹

The third fact relied on by Katz AJ, that the impugned policy would not change creditor behaviour provides an even clearer example that his inquiry fell far beyond the scope of the second leg of the Van Heerden test. Recall that the Minister argued that the policy would, by intervening at the provisional stage and allowing historically disadvantaged insolvency practitioners to develop their skills, expertise and build a reputation in the industry, lead to an increase in confidence in their competence and increase the likelihood of their appointment by the creditors.³⁰⁰ Katz AJ found that the Minister had not ‘adduced any evidence to demonstrate

²⁹⁶ SARIPA HC (note 26 above) at para 139.
²⁹⁷ Ibid at para 156.
²⁹⁸ Ibid at paras 160–161.
²⁹⁹ SARIPA CC (note 16 above) at para 89; See UNISA v Reynhardt 2010 12 BLLR 1272 (LAC) (The court held that once numerical targets have been achieved, an employer cannot rely on an affirmative action measure for future appointments); M Mushariwa, ‘UNISA v Reynhardt [2010] 12 BLLR 1272 (LAC): Does Affirmative Action Have a Lifecycle?’ [2012] Potchefstroom Electronic Law Journal 66 (Mushariwa argues that once numerical targets have been attained, the employer has to ensure that they are maintained).
³⁰⁰ SARIPA HC (note 26 above) at para 149.
the basis for their assumption that mechanical appointments can, in fact, change nomination behaviour by creditors.301 This finding is not what is required under this leg. Katz AJ moved from the position that the burden on the Minister had been to show that the measure would have the desired impact. In Van Heerden, Moseneke J made it clear that because the future was ‘hard to predict’, a measure would not pass constitutional muster if it was clear that the measure was ‘not reasonably likely to achieve the end of advancing or benefitting the interests of those who have been disadvantaged by unfair discrimination’.302 Whatever little faith Katz AJ had in the behaviour of creditors in South Africa, and their lack of confidence in Black and female practitioners, there was no basis for Katz AJ’s finding that there was no reasonable likelihood that the Minister’s intended benefit would accrue.

In all three judgments, there was a dispute about whether the list could work practically and whether the Minister had relied on the correct statistics to show the need for such a policy.303 Thus, for Mathopo J, the real problem with the policy was ‘the absence of proper information about the basis upon which the policy was formulated, and proper information concerning the current demographics of insolvency practitioners’.304 Absent these, he held that one could not ‘say that the policy was formulated, on a rational basis properly directed at the legitimate goal of removing the effects of past discrimination and furthering the advancement of persons from previously disadvantaged groups’.305 For Jafta J, one of the reasons that the policy failed this leg of the inquiry was that it was not clear whether the policy would require a single list or whether each Master would have his own list.306 In the context of the Minister’s testimony that work was underway to ‘clean-up’ the lists,307 it is not clear what more information could have been offered to establish the reasonable likelihood that appointing more persons belonging to disadvantaged groups would achieve the goals of transforming the insolvency industry. As Madlanga J reasoned in his dissent, a policy such as the one impugned in this case would, in time, transform the insolvency industry as it affords s 9(2) beneficiaries an advantage, a fact ‘so plain as to require no explanation’.308 Again, what the lower courts and Jafta J were asking for was beyond the standard of showing ‘reasonable likelihood’.309

A common finding in the Court’s and SCA’s majority judgments is that the policy was irrational because of the citizenship classification. Thus, Mathopo J found that “The prejudice to young Black men and women who have recently completed their studies, are well qualified and wishing to enter practice as insolvency practitioners, is obvious. There is no evidence either that this was considered by the Minister when formulating the policy.”310 For Jafta J, ‘A section 9(2) measure may not discriminate against persons belonging to the disadvantaged group whose interests it seeks to advance’.311 I agree with the judge’s assessment that absent reasons for the use of citizenship, the classification cannot be said to be a rational one. Of course, the Minister

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301 Ibid at para 162.
302 Van Heerden (note 7 above) at para 41.
303 SARIPA HC (note 26 above) at paras 166-182; SARIPA SCA (note 25 above) at paras 46–50.
304 SARIPA SCA (note 25 above) at para 47.
305 Ibid.
306 SARIPA CC (note 16 above) at para 40.
307 SARIPA HC (note 26 above) at para 180.
308 SARIPA CC (note 16 above) at para 89.
309 Van Heerden (note 7 above) at para 41.
310 SARIPA SCA (note 25 above) at para 36.
311 SARIPA CC (note 16 above) at para 42.
could have provided evidence that older practitioners were more disadvantaged than the young practitioners or that parity had been reached in the allocation of work between white males and all other young insolvency practitioners. Absent such reasons, the classification cannot be said to be rational. Even while agreeing with the Court’s assessment, the approach taken by Madlanga J, severing Category D from the rest of the policy accords with the commitment to preserving measures which genuinely seek to advance and protect disadvantaged groups.

2 Illusive stigmatic harm

Another flawed finding under this leg is Katz AJ’s argument that the impugned policy would cause harm to the intended beneficiaries as it did not allow the ‘excellent’ within the beneficiary group to thrive.312 Drawing from Cameron et al’s finding in Barnard that ‘over-rigidity’ risks disadvantaging the intended beneficiaries of affirmative action by creating ‘the impression that appointments are due only to race and exclusive of merit’,313 Katz AJ suggested that rigidity, in the sense of not taking individual merit, expertise and experience into account, violates the right to dignity of the intended beneficiaries of affirmative action. This is a common argument made against affirmative action, often, including in this case, without offering sufficient evidence of this harm or proof that the harm outweighs the benefit of these measures.314

Stigmatic harm is said to manifest in two ways. First, it gives rise to stigma and prejudice towards the beneficiaries of affirmative action because of the perception that they are unqualified quota candidates. This is what Onwuachi-Willig, Hough and Campbell call ‘external stigma’ — the burden of others’ (the privileged or dominant group) resentment or doubt about the qualifications of the beneficiaries of affirmative action.315 In Barnard, Cameron et al JJ warned against allowing race to be the decisive factor in employment decisions as it could, ‘suggest the invidious and usually false inference that the person who gets the job has not done so because of merit but only because of race’.316 Second, it ‘burdens’ the exceptional candidates within the beneficiary group. Thus, these measures cause an ‘internal stigma’ for those branded as affirmative action candidates.317 Katz AJ was referring to this internal stigma, reasoning that the policy was arbitrary for its failure to ‘reward excellence’.318

312 SARIPA HC (note 26 above) at paras 157–158, 205.
313 Ibid at para 205, referring to Cameron et al’s argument in Barnard (note 17 above) that ‘over-rigidity ‘risks disadvantaging not only those who are not selected for a job, but also those who are’ at para 80.
315 SARIPA HC (note 26 above) at para 158.
316 Barnard (note 17 above) at para 80.
317 Onwuachi-Willig, Hough & Campbell (note 314 above) 1301; S Carter, Reflections of an Affirmative Action Baby (1991) (who argues that the mark of being an affirmative action candidate makes light of the individual achievements of its beneficiaries).
318 SARIPA HC (note 26 above) at para 158.
The stigma (both internal and external) argument has been particularly successful before the US Supreme Court. Capturing this stigma argument, in *Bakke*, Powell J argued that:

Nothing in the Constitution supports the notion that individuals may be asked to suffer otherwise impermissible burdens in order to enhance the societal standing of their ethnic groups. Second, preferential programs may only reinforce common stereotypes holding that certain groups are unable to achieve success without special protection based on a factor having no relationship to individual worth.

There are two reasons why the stigma argument is not entirely persuasive, especially not for disqualifying a measure under the second leg of the test. First, the suggestion that persons belonging to groups that are beneficiaries of affirmative action are likely to be perceived as unqualified, incompetent, lacking in experience does not necessarily arise from being a beneficiary of affirmative action. It will often be rooted in past and persisting entrenched stereotypes and prejudices against specific groups. In a study of internal and external stigma in higher education admissions in the United States, Onwuachi-Willig, Hough and Campbell concluded that it could not be shown that the observed stigma on beneficiaries was as a result of being a beneficiary of affirmative action. Focussing specifically on race, the authors argued that stigma is rooted in institutional racism, it is not a by-product of affirmative action. This conclusion was based on their finding that there was no difference in the experience of stigma between institutions that had affirmative action policies in place and those that did not.

Second, the stigma argument is unpersuasive because there is insufficient empirical evidence to show that the harms of internal stigma (accepting that there are) outweigh the benefits of affirmative action. In a famous empirical study on affirmative action in higher education in the United States, Bok and Bowen argued that, if the charge that the stigmatic impact of affirmative action outweighed the benefits, ‘those who suffered from stigma would presumably be the ones most likely to feel its effects’. However, the empirical evidence did not support this, thus they concluded: ‘In the eyes of those best positioned to know, any punitive costs of race-based policies have been overwhelmed by the benefits gained through enhanced access’. Katz AJ problematically assumed this harm on behalf of all the intended beneficiaries.

The stigma argument is troubling for another reason, it is often based on the erroneous assumption that affirmative action measures necessarily allow for the appointment or promotion of unqualified or unskilled candidates — persons whose appointment attracts the stigma and prejudice related to their lack of capability, skill and expertise. This is because, so the argument goes, once appointed or promoted, the affirmative action beneficiaries will fail to perform their jobs, entrenching or creating a basis for prejudice and stereotyping against their group. This need not be the case. Under the EEA, the beneficiaries are suitably qualified, they just need not be as qualified as persons belonging to the non-beneficiary groups. Thus, in *Barnard*, Moseneke J rightly noted that affirmative action measures are not a refuge for the

319 Kennedy (note 6 above) at 115–127; Onwuachi-Willig, Hough & Campbell (note 314 above); Halaby & McAllister (note 314 above); Hibbett (note 319 above).
320 *Bakke* (note 9 above) at 298.
321 Onwuachi-Willig, Hough & Campbell (note 314 above) 1321.
322 Ibid 1332.
323 W Bowen & D Bok, *The Shape of the River: Long-Term Consequences of Considering Race and in College and University Admissions* (1998) at 265; Kennedy (note 6 above) at 125–127 (who makes the argument that the stigma argument is often an exaggeration).
324 Bowen & Bok (note 323 above) 265.
mediocre or incompetent.\textsuperscript{325} Seen in the context of the requirement of suitable qualification in \textit{SARIPA}, and the fact that the impugned policy allowed for deviation in cases where an estate was a complex one and the next-in-line practitioner does not have the requisite skill, the stigma argument was not persuasive in this case.

C \textbf{Does the measure promote the overall achievement of equality?}

The last leg of the \textit{Van Heerden} test requires that the measure, in the long run, promote the achievement of equality.\textsuperscript{326} This leg of the test requires the exercise of a value judgment, taking into account the multiple, complex and seemingly conflicting rights and values that arise in affirmative action cases.\textsuperscript{327} It is an examination of ‘the effects of the measure in the context of our broader society’.\textsuperscript{328} Thus, while the first two legs of the test are focussed on the group intended to be advanced and the purposes of affirmative action, in the language of the proportionality, the legitimacy of purpose and rationality of the measure, the third leg requires a broader analysis of the impact that the measure will have, including on the rights of those adversely affected by it.\textsuperscript{329}

Because the measure fails the second leg of the test, very little analysis of this third prong occurs. In fact, as noted in the discussion of the majority decision before the Court, Jafta J erroneously collapsed the second and third legs of the \textit{Van Heerden} test.\textsuperscript{330} However, the core argument against quotas is that they violate the right to dignity of non-beneficiaries. Following on the argument made by Kohn and Cachalia, the question whether quotas violate the dignity of non-beneficiaries properly falls under the third leg of the \textit{Van Heerden} test.\textsuperscript{331} Kohn and Cachalia argue that the impugned policy violated the right to dignity of persons in Category D, white males and youth, because their right to work would come around so rarely, ‘such that the Policy would essentially serve as an absolute barrier to the furtherance of their right to tackle their practice freely’.\textsuperscript{332} I have already dealt with severing the inclusion of youth from Category D. The focus now is on the dignity of white males.

The strongest argument that quotas violate the right to dignity of persons is that, in failing to take the individual merit, skills and expertise of individuals, looking at them through the lens of their race and gender, quotas negate the inherent human worth of persons and treat them as a means to an end. Closely related is the argument that rigidity violates the right of persons to practice their trade freely.\textsuperscript{333} In this regard, s 22 of the Constitution provides that ‘Every citizen has the right to choose their trade, occupation or profession freely.’ The s 22 right is closely related to the right to dignity in that, as the Court held in \textit{Affordable Medicines:}

\begin{quote}
Freedom to choose a vocation is intrinsic to the nature of a society based on human dignity as contemplated by the Constitution. One’s work is part of one’s identity and is constitutive of one’s dignity. Every individual has a right to take up any activity which he or she believes himself or
\end{quote}

\textsuperscript{325} \textit{Barnard} (note 17 above) at para 41.

\textsuperscript{326} \textit{Van Heerden} (note 7 above) at para 44.


\textsuperscript{328} \textit{Van Heerden} (note 7 above) at para 44.

\textsuperscript{329} McConnachie (note 12 above) 172; Albertyn (2015) (note 12 above) at 730.

\textsuperscript{330} \textit{SARIPA CC} (note 16 above) at para 46.

\textsuperscript{331} Kohn & Cachalia (note 12 above) 168–177.

\textsuperscript{332} Ibid 177.

\textsuperscript{333} Ibid 172.
herself prepared to undertake as a profession and to make that activity the very basis of his or her life. And there is a relationship between work and the human personality as a whole.\textsuperscript{334} The quote above captures what Woolman calls the ‘self-actualization’ dimension of dignity.\textsuperscript{335} This refers to an individual’s capacity to create meaning for herself, including through the development of her talent. According to Woolman, this generates ‘an entitlement to respect for the unique set of ends that the individual pursues.’\textsuperscript{336} Section 22 protects the right to choose a profession and the right to practise a profession.\textsuperscript{337} As with the right to dignity, s 22 has to be interpreted within the context of prevailing unequal distribution of work, in this case, against the background of a continued hegemony of white males in the insolvency industry. As Ngcobo J held in \textit{Affordable Medicines}, s 22:

[H]as to be understood as both repudiating past exclusionary practices and affirming the entitlements appropriate for our new open and democratic society. Thus in the light of our history of job reservation, restrictions on employment imposed by the pass laws and the exclusion of women from many occupations, to mention just a few of the arbitrary laws and practices used to maintain privilege, it is understandable why this aspect of economic activity was singled out for constitutional protection.\textsuperscript{338}

Taking the context outlined in the quote above, it would be ironic to argue that this right prohibits measures simply because they fail to take the individual merit, skills and expertise of persons when furthering the goal of redressing past exclusionary practices. The only way to conclude that quotas violate the right to dignity and the right to practice one’s trade is if these rights were interpreted as entitling non-beneficiaries of affirmative action ‘to competitions in which people are judged on the basis of individual merit, by which they means skills and accomplishments attributable to themselves’.\textsuperscript{339} Such a reading of ss 10 and 22 of the Constitution would render affirmative action measures under s 9(2) superfluous. Sections 10 and 22 do not protect the right to have one’s merit, skills and expertise taken into account, nor do they protect a right to a job or promotion.

However, as I argued in the analysis of the relationship between the right to dignity and affirmative action measures, measures which exclude a group from being able to choose a profession or practise their profession, especially on the grounds of race, gender or disability status would likely be found to violate ss 22 and 10 of the Constitution. This is because such measures would ‘obliterate’ their opportunities and permanently disqualify them from entering or advancing in a particular career.\textsuperscript{340} This is the ‘substantial and undue harm on those excluded from its benefits’ that would threaten our ‘long-term constitutional goal’.\textsuperscript{341} Such measures could be said to treat such persons as ‘underclass’.\textsuperscript{342} Thus, the prohibition of absolute barriers to the appointment or promotion of persons from historically privileged groups under

\begin{thebibliography}{99}
\bibitem{AM} \textit{Affordable Medicines Trust & Others v Minister of Health & Another} 2005 ZACC 3, 2006 3 SA 247 CC (\textit{Affordable Medicines}) at para 59.
\bibitem{Woolman} Woolman (note 128 above) ch 36-11.
\bibitem{Ibid} Ibid.
\bibitem{AM2} \textit{Affordable Medicines} (note 334 above) at para 66.
\bibitem{Ibid1} Ibid at para 58.
\bibitem{Kennedy} Kennedy (note 6 above) 109.
\bibitem{Ackermann} Ackermann (note 125 above) 361; \textit{Barnard} (note 17 above) at para 180.
\bibitem{Van Heerden} \textit{Van Heerden} (note 7 above) at para 44.
\end{thebibliography}
the EEA and s 9(2) would accord with the respect for ss 22 and 10 of the Constitution. But quotas, however rigid need not have this impact.

Katz AJ, as well as Kohn and Cachalia’s argument is based on the premise that rigidity, necessarily creates an ‘absolute barrier to the furtherance of their right to practice their trade freely’. But, they are not excluded from practising their profession. The impugned policy sought to limit this particular group’s disproportionate share in the market — they have no right to the other nine appointments — neither the right to dignity nor the right to practise one’s trade should be understood as protecting such a right. Moreover, as Madlanga J argued in his dissent, to the extent that the policy only affected provisional appointments, it could not be said that the policy created an absolute barrier to their appointment. The question was whether the measure has the impact of obliterating the opportunities of persons adversely affected thereby, creating an absolute barrier to their advancement so that it can be said that they are an ‘underclass’, being treated as ‘inferior’ and ‘demeaned’. The facts of SARIPA do not establish this.

Every quota must be examined on its own merits and in its own context; this is what a ‘situation-sensitive’ approach demands. There will be cases where rigidity creates an absolute barrier for the advancement of non-beneficiaries or another adversely affected group. There will also be cases where it is clear that a quota will not advance or protect a disadvantaged group. There will be cases where, overall, it cannot be shown that a quota will promote the achievement of equality. However, rigidity alone is not sufficient to reach any of these findings.

An example of an impermissible quota is in Naidoo. In Naidoo, an Indian woman applied for a position as cluster commander in the South African Police Services (SAPS). She was shortlisted for the position and had the second highest score in the interviews. The interview panel recommended her appointment as it would address gender equity at that occupational level. However, the national panel rejected her appointment in favour of a Black male on the basis that ‘Africans were under represented and Indian females had an ideal representation’. This ‘ideal representation’ for Indian women was zero. The calculation used to determine the race and gender allocation was explained as follows:

19 positions on level 14 are multiplied by the national demographic figure for a specific race group eg 19 positions $\times$ 79% Africans = 15 of the 19 posts must be filled by Africans, then $15 \times 70\% = 11$ positions to be filled by African males minus the current status of seven meaning there is a shortage of four African males. For Indian females the calculation is $19 \times 2.5\% = 0.5$ positions to be filled by Indians, then $0.5 \times 30\% = 0.1$ Indian females and that is rounded off to zero. Of the five available positions 0.125 could go to Indians $\times 30\%$ gender allocation means 0.037 could be allocated to Indian females and that is rounded to zero.

Ms Naidoo argued that she had been unfairly discriminated against on account of both her race and gender. In particular, she argued that the numerical target and the formula described in the quote above constituted an absolute barrier for the appointment of Indian women.

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343 Kohn & Cachalia (note 12 above) 176.
344 Naidoo v Minister of Safety and Security & Another 2013 ZALCJHB 19, 2013 5 BLLR 490 LC (‘Naidoo’).
345 Ibid at paras 2–4.
346 Ibid at para 5.
347 Ibid at par 35.
348 Ibid at paras 42–43.
349 Ibid at para 8.
350 Ibid.
On evidence before the court, the practice was to prioritise race over gender, regardless of the context.\(^{351}\) In this case, there was a failure to take into account the fact that women are generally underrepresented in the SAPS and the public sector in general, especially at the high position for which Ms Naidoo applied. Further, without providing reasons, the plan had a gender allocation of 70 per cent male to 30 per cent female.\(^{352}\) This ratio was used despite a cabinet decision to achieve 50/50 gender representation in the senior management of the public service,\(^{353}\) and the fact that at the time, national census statistics showed that women were 51 per cent of the national population.\(^{354}\) Taking all these factors into account, the court rightly concluded that the numerical target had ‘a manifest exclusionary effect’.\(^{355}\)

The numerical targets in *Naidoo* and their rigid implementation in that case is an example of an impermissible quota. The quota in *Naidoo* completely foreclosed the appointment of Indian women, a member of the intended beneficiaries of affirmative action under the EEA — a fact not lost to the court as it noted: ‘The fact that the barrier is created and results in a person from a designated group suffering discrimination, both on the grounds of her race and gender, is perverse’.\(^{356}\) The absolute barrier created in this case, creating a complete bar for the advancement of a person belonging to multiple disadvantaged groups and on the basis of numerical targets that express a lack of commitment to the inclusion of women in the SAPS, a group historically excluded from this service, undoubtedly had the impact of entrenching and perpetuating patterns of disadvantage, violating the right to dignity. No reading of the *Naidoo* case could justify the numerical target and its implementation as constitutional. However, as is hopefully clear from the analysis above, the *Naidoo* facts are manifestly different from the facts in *SARIPA*.

VI CONCLUSION: THE REAL IMPACT OF AN ABSOLUTE PROHIBITION OF QUOTAS

It bears emphasis that though affirmative action measures, including the use of quotas, may narrow the opportunities for non-beneficiaries, this is not the result of ‘an effort to humiliate, ostracize or stigmatize’ them.\(^{357}\) Moreover, rigidly applying quotas will not always create an absolute barrier for the advancement of non-beneficiaries. The real impact of the extension of the quota-ban in *SARIPA*, is a push towards bringing back individual merit. This will undermine the goal of realising the right to equality and dignity of historically disadvantaged groups through affirmative action measures as defined in this paper.

The prevailing definition of quotas — based on whether there is sufficient flexibility to take individual skill, expertise and circumstances of claimants into account — neither fits the framework under the EEA nor s 9(2) of the Constitution. The EEA and the impugned policy in *SARIPA* were cognisant of the context of past and persisting racial, gender and other forms of domination and oppression which have allowed white males to assume skills, experience and expertise over other groups. As Madlanga J acknowledged in his dissent, white males are

\(^{351}\) Ibid at para 38.
\(^{352}\) Ibid at para 15.
\(^{353}\) Ibid at paras 18–20.
\(^{354}\) Ibid at para 17.
\(^{355}\) Ibid at paras 141–145.
\(^{356}\) Ibid at para 158.
\(^{357}\) Kennedy (note 6 above) 110.
likely to have more expertise in the insolvency industry. This relative experience and expertise are ‘a function of previous naked racist preferences and the exclusion of other groups from acquiring skills and opportunities’.\textsuperscript{358} We can make the same argument across several sectors and institutions. From this perspective, the definition of quotas’ focus on taking individual merit, skills and expertise into account undermines redressing group-based disadvantage.

The affirmative action regime in South Africa allows for and requires preferential treatment. Thus, in the Labour Appeal Court judgment in \textit{Correctional Services}, Rabkin-Naicker J rejected ‘tiebreaker equality of opportunity’. Responding to the argument that ‘equal opportunity’ required the equal treatment of all persons, Rabkin-Naicker made it clear that equality of opportunity could not be interpreted in the narrow sense as meaning ‘that persons from designated groups are treated no differently from persons who are from non-designated groups — the opportunities offered to persons from designated and non-designated groups must, therefore, be the same’.\textsuperscript{359} Relying on the conceptual framework in \textit{Van Heerden} as an interpretive tool, she noted:

\begin{quote}
I reject the notion that the restitutionary measures the EEA promotes amount to equal opportunity for designated groups to compete with the prime beneficiaries of past systemic and institutionalised discrimination. It is noteworthy that no claim was made in the submissions before me that a level playing field had been reached for the enjoyment of these equal opportunities. Of course, no such submission would withstand scrutiny.\textsuperscript{360}
\end{quote}

Accepting Rabkin-Naicker J’s analysis, the argument that rigidity is contrary to achieving ‘equity’ because ‘it does not provide for any transition from mechanical appointments to a system of equitable competition’\textsuperscript{361} does not fit. The very point of affirmative action is to give disadvantaged groups preference, understanding that because of historical and persisting barriers to access to education, training and opportunities to acquire skills and expertise, the market, without positive intervention, would continue to marginalise disadvantaged groups.

Not only is it possible to find quotas to meet the challenge in s 9(2) of the Constitution, in cases where other, more flexible measures have failed, especially in cases where the failure is due to intractable, deeply-entrenched practices of nepotism or prejudice towards historically disadvantaged groups, they may be necessary. In his dissenting opinion in \textit{SARIPA}, Madlanga J notes that we may need a ‘simple, practical formula’ to eliminate the possibility of undue preferences.\textsuperscript{362} In eliminating discretion, quotas are a simple and practical tool to prevent against the deep and hidden barriers to the entry of disadvantaged groups into a profession or institution. For example, the alleged corruption, fronting practices and preference for white male insolvency practitioners which the policy in \textit{SARIPA} sought to address.\textsuperscript{363} By removing the discretion to take individual characteristics, skills and expertise into account, quotas are a better tool to further the goal of redressing group-based disadvantage and fulfil the right to equality and dignity of disadvantaged groups. This is because ‘flexible’ numerical targets under these conditions, could be used to thwart the purpose of affirmative action measures by giving

\textsuperscript{358} \textit{SARIPA} CC (note 16 above) at para 78.
\textsuperscript{359} \textit{Solidarity v Department of Correctional Services & Others; In Re: Solidarity & Others v Department of Correctional Services & Others, Solidarity & Others v Department of Correctional Services & Others} 2013 ZALCCT 38, 2014 1 BLLR 76 LC at para 23.
\textsuperscript{360} Ibid at para 30.
\textsuperscript{361} \textit{SARIPA} HC (note 26 above) at para 160.
\textsuperscript{362} \textit{SARIPA} CC (note 16 above) at para 78.
\textsuperscript{363} \textit{SARIPA} HC (note 26 above) at paras 49, 79, 164.
decision-makers a defence for why there is an over-representation of privileged groups in an industry. They can simply rely on the relatively better expertise and skills of this group.

In addition, some institutions or professions could be resistant to realising their obligations under the Constitution or in other legislation or the practices and culture that excludes historically disadvantaged groups may be so deeply entrenched that only a hammer, in the form of rigid quotas, can redress existing inequalities. In SARIPA, the impugned policy was not the first intervention by the Ministry. The previous policy attempted to redress existing patterns by pairing insolvency practitioners who belong to historically disadvantaged groups with those ordinarily appointed under the requisition system, presumably, the majority of whom would be white males. The Ministry argued that this intervention did not redress the inequitable redistribution of work in the industry. Accepting the policy in SARIPA as a rigid quota for failing to take into account the skills, expertise and experience of insolvency practitioners except in those cases where it was necessary to meet the needs of an estate, in light of the failure of past intervention, it could be argued that the use of a quota was necessary in this case.

Therefore, the current misconception that the Constitution requires an absolute ban on quotas is not only a flawed interpretation of constitutional text and principle, but may act as its own barrier to achieving those very same constitutional goals affirmative action measures are intended to achieve. This is due to misunderstanding the relationship between dignity and substantive equality in this area of law. Ironically, it is the lack of a contextual and situation-sensitive approach to quotas that may become an absolute barrier itself to substantive equality and so perpetuate the iniquities of past and present inequality. This paper has shown that, under a proper application of the Van Heerden test and in line with the contextual understanding of the right to dignity described above, some quotas can pass constitutional muster.
Sexual Harassment and Disciplinary Procedures: Never the Twain Shall Meet

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ABSTRACT: Notwithstanding extensive theoretical discourse on sexual harassment and how and why it occurs, sexual harassment abounds. In contrast, accountability is rare. Impunity continues notwithstanding the impact of hashtag movements against sexual harassment. This article discusses the reasons why sexual harassment continues to be so rarely addressed in the workplace, despite the unprecedented universal openness and anger about sexual harassment, and about the impunity that follows.

At the core of this impunity is a profound dissonance between the harm of sexual harassment, on the one hand, and traditional workplace disciplinary procedures, on the other. The procedural deficiencies have been identified and critiqued by theorists for decades. For the first time, however, details of these deficiencies are mainstream. They have come to the attention of the public consciousness through the mass coverage of the poignant, at times, devastating, stories of sexual harassment.

While these movements have turned organisations’ attention to the fact that they need to take sexual harassment seriously, there has been a dearth of real and effective reimagining of the disciplinary procedures themselves. The status quo, therefore, is that we know there is a staggering level of harm caused as a result of sexual harassment; we know that workplace disciplinary procedures tend to fail persons who experience sexual harassment; but we have almost no attempt to modify and reconceptualise the structures of disciplinary procedures. It is the paucity of recommendations for technical adjustments to the disciplinary procedures which is the focus of this article.

KEYWORDS: discrimination, gender, hashtag movements, violence

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1 SEXUAL HARASSMENT AND PROCEDURAL DEFICIENCIES

A Sexual harassment and the hashtag movements

Since the 1970s, a litany of thoughts, articles and theories regarding sexual harassment in the workplace have emerged. This literature has covered the definitions of sexual harassment; the social and economic structures that allow sexual harassment to proliferate in the workplace; and the misalignment between workplace disciplinary procedures, and the harm of sexual harassment. This volume of commentary notwithstanding, sexual harassment abounds and, importantly for this analysis, accountability is still rare.

Impunity continues notwithstanding the impact of hashtag movements against sexual harassment. These movements include, for example, #MeToo; #RUReferenceList; #EndRapeCulture; and #AmINext. In this article, I discuss the reasons why sexual harassment continues to be so rarely addressed in the workplace, despite the unprecedented universal openness and anger about sexual harassment, and about the impunity that follows.

At the core of this impunity is a profound dissonance between the harm of sexual harassment, on the one hand, and traditional workplace disciplinary procedures, on the other. The procedural deficiencies have been identified and critiqued by theorists for decades. For the first time, however, details of these deficiencies are mainstream. They have come to the attention of the public consciousness through the mass coverage of the poignant, at times, devastating, stories of sexual harassment.

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I use the stories and theories that emanate from the #movements to demonstrate how the current workplace disciplinary procedures in South Africa dissolve as soon as they touch the reality of sexual harassment cases; and how these procedures might be readjusted. The subtle, insidious and private nature of workplace sexual harassment means that the procedural mechanisms designed to address it bypass the harm completely. The law and the harm operate on two different sides of a proverbial highway. The occurrence of sexual harassment moves in one direction, while the legal and disciplinary processes move in the other.

The inability of the current structures of law and procedure to prevent and punish this harm requires feminist-based adjustments to disciplinary procedures. Such adjustments, I argue, are consistent with the principles of procedural fairness and do not catastrophise the structures of due process and fair adjudication.

B Language

Before proceeding with my arguments, it is necessary to explain the language I use. I do so, not only for effective and considered communication but also, because the language is a ‘definer of reality.’ The language we use to describe acts of sexual harassment, the people against whom they are perpetrated, the people who perpetrate the acts, and where the acts occur, will have an impact on how organisations can discipline perpetrators effectively.

1 The workplace

I refer throughout this article to the ‘workplace’. By ‘workplace’ I mean the institutions or organisations in which people work. I include in this concept universities. While students, of course, are not working for remuneration, they are in a workplace system, in which sexual harassment occurs at a staggering rate and in which the disciplinary procedures mirror those in typical business organisations. I also include non-profit organisations in this concept. While non-profits do not operate to make a profit, they still carry on a business and the same harm and procedural deficiencies arise.

2 Male/Female

I resort to the male/female binary in analysing sexual harassment (the person who experiences it is female; the perpetrator is male). It is simplistic and elides the many other ways in which people are othered and excluded from the workplace. This binary itself is exclusionary and does not engage harassment between people of the same sex and harassment against LGBTI+ persons. My analysis is narrow because the full engagement with the multiplicity of ways in which people are excluded from and violated in the workplace exceeds the ambit of this article. It is hoped that some of the points I make in this article, and recommendations regarding workplace sexual harassment procedures, will be applicable, albeit only in part, to the experience of sexual harassment by persons who do not identify according to this binary.

3 The person

There is a perennial difficulty regarding the language we use to label the person who experiences sexual harassment. The dominant terms are ‘victim’, ‘survivor’ or ‘complainant’.

The ‘victim’/‘survivor’ dichotomy has raised contestation that far exceeds the ambit of any simple analysis. For my argument, which focuses on procedural responses to sexual harassment, the terms ‘victim’ and ‘survivor’ are both equally deficient, and both have an impact on the way a person is perceived.7 ‘Victim’ is a label that some argue imports a perception of weakness and brokenness about the person who experiences sexual harassment.

‘Survivor’ elides the emotional and physical progression and regression that often characterises women’s experience following the act(s) of sexual harassment.8 The experience is not necessarily linear, moving from victim to survivor. This understanding is essential for developing effective workplace procedures. The harm is not a singular moment but a continuum. Sexual harassment can ‘induce an ongoing environment of fear and control’.9 ‘Survivor’ also imputes a notion of strength. From a social science and feminist theory point of view, the invocation of the power of a person who has experienced sexual harassment is important. However, from the point of view disciplinary procedures and policies, the workplace response to sexual harassment must cater for women who are able to denounce the perpetrator and for women who are unable, for a host of reasons, to challenge the behaviour.10 It is important, therefore, that the connotation of strength and recovery be imported into the sexual harassment procedures.

The term ‘complainant’ is also improper.11 Some women who experience sexual harassment do not complain, formally or informally. Moreover, as will become clear below, I argue that there should be a distinction between the person who experiences the harassment and the person who brings the complaint. The person who experiences the sexual harassment may be the complainant; but the complainant is not always necessarily the person who experienced the sexual harassment.

The truth is that the terms we use are superimposed on people who experience sexual harassment and deprive that person of choosing identifying language that emanates from her experience.12 Talking about a victim or harassed woman imposes subconscious associations that may impact the efficacy of workplace responses to sexual harassment. In light of this, I refer to the person who experiences sexual harassment as ‘the person’. The person who perpetrates harassment is the ‘perpetrator’ or ‘harasser’.

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10 These reasons will be discussed below.
11 The term ‘complainant’ is used in the report by the Sexual Violence Task Team at Rhodes University: Sexual Violence Task Team “We Will not be Silenced”: A Three–Pronged Justice Approach to Sexual Offences and Rape Culture at Rhodes University University Currently Known as Rhodes (UCKAR) Critical Studies in Sexualities and Reproduction (2016).
II THE IMPORTANCE OF ADJUSTING DISCIPLINARY PROCEDURES FOR SEXUAL HARASSMENT

A Two realities

There are two realities which stand in stark contradistinction to one another. The first reality is that all women run the risk of experiencing sexual harassment in the workplace and, depending on which set of statistics you choose, a third to a half of women in the workplace experience sexual harassment.\(^{13}\) On the other hand, men are rarely held to account for acts of sexual harassment.\(^{14}\) In other words, the extent of accountability is radically disproportionate to the extent of the harm.

Of course, there is no shortage of legal standards regarding sexual harassment. Section 6(1) of the Employment Equity Act 5 of 1998 (the EEA) prohibits unfair discrimination on the grounds that include gender, sexual orientation and birth. Section 6(3) provides that ‘Harassment of an employee is a form of unfair discrimination and is prohibited’. Incorporated in the EEA is the Code of Good Practice on the Handling of Sexual Harassment Cases in the Workplace (the EEA Code of Good Practice). Section 4 of the EEA Code of Good Practice provides a ‘test for sexual harassment’ which includes:

4.1 whether the harassment is on the prohibited grounds of sex and/or gender and/or sexual orientation;
4.2 whether the sexual conduct was unwelcome;
4.3 the nature and extent of the sexual conduct; and
4.4 the impact of the sexual conduct of the employee.

There is also the 2005 Amended Code on the Handling of Sexual Harassment Cases in the Workplace (‘the amended code’), issued by the Minister of Labour in terms of s 54(1)(b) of the EEA.

The courts have also been clear about the seriousness of sexual harassment and its diminution of equality and dignity. In *Campbell Scientific Africa (Pty) Ltd v Simmers*,\(^{15}\) Savage AJA said:

> By its nature such harassment creates an offensive and very often intimidating work environment that undermines the dignity, privacy and integrity of the victim and creates a barrier to substantive equality in the workplace. It is for this reason that this court has characterised it as ‘the most heinous misconduct that plagues a workplace.’\(^{16}\)

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\(^{14}\) Gouws (note 3 above) at 4.


In June 2019, the International Labor Organisation adopted ILO Convention Concerning the Elimination of violence and harassment in the world of work (the ILO Convention). The Preamble to the ILO Convention states that violence and harassment prevent women from ‘accessing, and remaining and advancing in the labour market’ and that violence and harassment are ‘incompatible with the promotion of sustainable enterprises and impacts negatively on the organisation of work, workplace relations, worker engagement, enterprise reputation, and productivity’. The ILO Convention also contains several provisions regarding procedures that states should ensure are adopted in the workplace to address sexual harassment.

This legal imperative, coupled with the hashtag movements, have led to the adoption by most workplaces of sexual harassment policies and procedures. These processes, however, have not paid attention to whether employer interventions actually prevent or effectively punish sexual harassment. Legal and procedural responses to sexual harassment develop — with reference to the moral blameworthiness of isolated individual perpetrators, to rely solely on existing legal categories even if they fail to resonate with women’s lived experience of harassment, and to leave the larger systemic context of sexual harassment unquestioned. The truth is that the ‘law sets itself above other knowledges like psychology, sociology, or common sense. It claims to have the method to establish the truth of events.’

B Procedural fairness

The misalignment between the psycho-social causes and effects of sexual harassment, and currently constructed disciplinary procedures, demands reform. One of the key challenges in adjusting disciplinary procedures is the imperative of procedural fairness. The right to a fair process has been one of the most common defences that perpetrators raise. This has become more pronounced in the face of the naming and shaming that comprised part of the hashtag movements. The naming and shaming methodology has led to a backlash regarding the question of due process.

While many have welcomed this cultural, legal, and structural reckoning, serious concerns have also dominated the recent public conversation. Those sceptical of #MeToo have emphasised the lack of due process in the naming and shaming campaign. In particular, sceptics emphasise the lack of a clear path and procedures by which an accused can successfully contest allegations, judgement by the public rather than by a jury or other independent decision-maker, ‘the risk of false positives, and the potential for disproportionate consequences that are often framed as punishments.’ Due and fair process, therefore, is once again at the forefront of those who resist institutional change in disciplinary procedures.

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18 Ibid 190.
19 Grossman (note 4 above) at 4.
20 Sheppard (note 4 above) at 259.
22 Grossman (note 4 above) at 4.
C Three proposals for procedural reform

I propose that there are procedurally sound ways of attenuating the misalignment between the proliferation of sexual harassment, and the scarcity of accountability.\(^\text{24}\) I argue that we should reimagine three concepts: the first is about who may be a complainant in sexual harassment disciplinary procedures; the second is about what constitutes evidence of sexual harassment; and the third concerns who the person is who investigates, prosecutes and adjudicates sexual harassment cases.

The complainant or witness is not necessarily the individual who experienced sexual harassment but the management who is aware of the complaints of sexual harassment. The evidence is not only the act/s of sexual harassment but also managers’ and other third-party employees’ knowledge of the perpetrator’s predatory behaviour. All parties involved in the hearing, including the investigators, prosecutors, and adjudicators, must have specialised knowledge of gender-based violence.\(^\text{25}\)

There are many other recommendations for structural reform of sexual harassment disciplinary procedures. These include reforming the rules of evidence; redefining consent; and establishing definitive and objective rules about interpersonal behaviour and relationships in the workplace (including, for example, a no-hugging policy). Each proposal demands an extensive analysis that exceeds the scope of this article. I therefore focus on the three recommendations mentioned above, which I believe are easily implementable. Their success, however, depends on a much wider and more multifaceted overhauling of sexual harassment disciplinary procedures. I delve into the details of these recommendations below.

III SUBSTANTIATING MY PROPOSED REFORMS WITH REFERENCE TO THE HASHTAG MOVEMENTS

One of the most informative aspects of the #movements is that they demonstrate the spectrum of harm that constitutes sexual harassment. Knowing what sexual harassment is — and what it is not — is one of the first stumbling blocks in successful disciplinary procedures. Academics, theorists and activists certainly know the various ways in which sexual harassment occurs. However, there is a staggering lack of knowledge about sexual harassment on the part of employees in the workplace and officials who are responsible for undertaking disciplinary procedures.

While organisations may have specialists to deal with, for example, fraud or theft, they seldom have experts who deal with sexual harassment.\(^\text{26}\) Moreover, expertise is necessary: sexual harassment is often amorphous and intangible. Even the victim herself may not identify the harm she has experienced as an infraction committed by the perpetrator.\(^\text{27}\) She may feel violated, hurt, insecure and afraid as a result of the conduct. However, she may not immediately identify the abuser’s conduct itself as a violation.

This amorphousness is linked to the failure of organisations to hold perpetrators to account. The hashtag movements demonstrate how sexual harassment occurs and how the system of

\(^{24}\) The importance of re-imagining sexual harassment procedures is discussed by D Tuerkheimer ‘Beyond #MeToo’ (2019) 94 New York University Law Review 1146, 1151.


\(^{26}\) Grossman (note 4 above) at 60.

\(^{27}\) EL Dey, JS Korn & LJ Sax ‘Betrayed by the Academy: The Sexual Harassment of Women College Faculty’ (1996) 67 The Journal of Higher Education 149, 150.
accountability breaks down. While these movements are different in many respects, they all have one unifying characteristic: perpetrators of sexual harassment are not punished. The movements highlight that there are men who —

were well-known for their sexual violation of women students, but that no action was taken against them. They sat in their classes, walked the streets with them and kept on harassing them.29

In the following analysis, I refer to various movements and high-profile sexual harassment cases to demonstrate the ways in which disciplinary procedures break down.

A The fallacy of bringing a complaint

Sexual harassment is radically under-reported.30 The problem with under-reporting is that the current model of sexual harassment disciplinary procedures is predicated on a person reporting sexual harassment.31 If the person does not report, the organisation becomes paralysed. The reasons for under-reporting are extensive but at the heart of under-reporting is the fact that bringing a complaint is extraordinarily difficult.

In 2018 in the United States case of Sheri Minarsky v Susquehanna County,32 an appalling tale of persistent sexual harassment emerged. Minarsky’s manager would hug and kiss her, massage her shoulders, call her house, send her sexually explicit emails and ask overly personal questions. At first Minarsky ignored the behaviour and tried to protest the touching in a jocular manner. Nevertheless, the harassment continued. When she rejected his advances, he became ‘nasty’ and promised that she would lose her job if she reported him.33 Minarsky later found out that the manager had harassed other women and that he had been reprimanded for a prior incident. Yet she still did not report the matter for fear of retaliation. For Minarsky, the stakes were high: she had taken the job to pay for her daughter’s cancer treatment.34 She was trapped.35

Many persons will resist reporting sexual harassment because they have seen how previous cases have been mishandled. In many instances, the person simply wants the harassment to

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29 Gouws (note 3 above) at 4.
32 Houseman (note 2 above) at 278.
33 Ibid for a discussion of the case.
34 Fear of retaliation is discussed by Houseman, ibid at 285.
stop and does not want to incur the burden of securing a perpetrator’s dismissal. Persons may believe that —

nothing can or will be done, and many are reluctant to cause problems for the harasser. The most common reason, however, is fear—fear of retaliation, of not being believed, of hurting one’s career, or of being shamed and humiliated.36

Where a person does lodge a complaint and pursues a formal investigation, she often emerges more violated, frightened, victimised and ostracised than she was before the process began.37 In a US study, it was found that ‘nearly half of the victims of harassment lost their jobs and an additional 25 per cent quit due to “fear and frustration”’.38

‘Justice’ is achieved at the expense of the person. Two cases in which the author was involved demonstrate this. In the first case, the employee had been touched, harassed and pursued by her manager. He was extremely influential and was one of the leading specialists in his area of work in the country. He had a reputation, as a white man, of preying on, pursuing and then ostracising young black women coming into the industry. In this particular case, the person refused his overtures on many occasions. He eventually responded by excluding her from all the work in which she had been involved. Because he was the country’s leading expert in this area of work, he held the keys to enable her to access a career in this work. He had clearly locked her out. When she complained about the harassment, the organisation’s response was replete with deficiencies. What emerged, however, is that the perpetrator had been known to harass women for about 20 years. Most women left the organisation and the industry to pursue entirely different careers. It was hardly surprising that there were (and are) very few black women in this specialised area of work today. The organisation tried, with limited knowledge and expertise, to address the complaint. Ultimately, the perpetrator resigned. But, so did the person whom he had harassed. She maintained a career in the industry but experienced the burden of being responsible for bringing down one of the ‘best’ in the industry.

In the second case, a black woman was consistently harassed by her manager. She refused his advances, and her promotion was denied. She pursued a formal complaint against him. He resigned during the disciplinary process, which was never concluded. In the last five years, she has not been able to obtain work in her industry, notwithstanding a decade of experience at a senior level and a Harvard master’s degree.

Let us take a step back and consider exactly what it is we are asking a person to do through a formal disciplinary procedure. Sexual harassment triggers a sense of alienation within the organisation and causes long-term damage.39 Perpetrator behaviour that engages work colleagues about their physical appearance, or imports romantic or sexual sentiments into the workplace, confirms the structural gendered hierarchies that a female colleague is female before she is a colleague. Add to this the fact that, given the high rates of violence against women in South Africa, sexual harassment triggers a host of fears, often subliminally. Sexual harassment confirms that the dominant demographic of the workplace will not allow women an equal

36 Beiner (note 4 above) at 139.
37 Grossman (note 4 above) at 51–52.
38 Beiner (note 4 above) at 140.
39 Media 24 Limited & Another v Sonja Grobler (2005) 3 All SA 297 (SCA), [2005] ZASCA 64 at para 65: ‘an employer owes a common law duty to its employees to take reasonable care for their safety... This duty ... must also in appropriate circumstances include a duty to protect them from psychological harm caused, for example, by sexual harassment by co-employees’.
opportunity to work. More worryingly, it confirms that she is not safe in her place of work. Why then, would she ask the very workplace that is the place and space of her fear, to help her?

This power disparity is mirrored in the typically overly-legalistic disciplinary procedures. The legalistic formality of disciplinary procedures — without understanding the imperatives that drive complainants, fear of retribution and the need for a nuanced response — begins to replicate the power of authority that led to the violation. It is easier to remain silent or resign than it is to being a complainant.40

B Power and control

Given the fact that men hold most senior positions in the workplace, there is a de facto asymmetry of power, where men are in positions of control over women’s professional lives. This power imbalance demands a greater interrogation of the notion of choice women have when facing sexual harassment in the workplace. A person’s agency to reject romantic or sexual advances may be curtailed. The process of making and executing choices regarding sexual harassment, including the ability to refuse romantic or sexual overtures, or to vocalise a sense of violation or fear, is not as neat, for example, as consenting to buy or sell a motor vehicle.

The power-control dyad squeezes the contours of true choice. This is not to say that a person is never able to decline the advances. Unless the situation involves physical strength or threats of harm, the person is technically free to decide to rebuff the advances and to lodge a complaint. However, a person’s choice and control are in a compression chamber of variables that reduce the person’s freedom to reject the advancements and to seek accountability.

The ‘power-control’ factor means that a person’s ‘choice’ is fettered by the potential of the harasser to exercise his control to the detriment of the person he harasses. Depending on one’s circumstances, this may be a factor that obviates choice entirely.

The power-control factor creates an exhausting environment for women who must tap-dance around an array of impossible situations. Reporting this harm is rarely an option. This is so for many reasons: the occurrence of the harm is ethereal and cannot always be linked to a specific moment; if challenged about the exclusion, harassers typically justify their conduct on the basis that the target’s work was unsatisfactory; and the very seniority of the harasser usually means that it is most unlikely that the structures of governance (to the extent that such exist) will expel him from the workplace.

C Rape culture

The notion of rape culture is at the heart of sexual harassment impunity. While not all sexual harassment comprises rape, rape culture leads to a normalisation of all sexual violence. It entails the blaming of victims for their harassment and the acquiescence to biases and assumptions of gendered roles that justify violence and discrimination. The result is an entrenched failure to support persons and protect them from sexual harassment.41

40 Calitz (note 25 above).
The impact of rape culture was highlighted in the 2016 protests at Rhodes University by the student-led Chapter212 campaign to publicise and challenge the University’s complicity in rape culture. The Chapter212 campaign shone a spotlight on the University’s failure to address sexual harassment. It maintained that the University management was responsible for perpetuating rape culture at Rhodes by using improper definitions of gender-based violence that did not capture the full array of harm that women experience; that the policies were slanted in favour of the accused; and that the University adopted an approach of victim-shaming and defending the accused.

At the heart of the movement was not only the fact that there was a normalisation of rape on the campus but also that the University as an institution was delinquent in facilitating processes that could successfully lead to the proper punishment of perpetrators. The result was that students and staff who had been raped, attacked, hurt and harassed, were vilified and silenced. On the other hand, students and staff who had raped, attacked, hurt and harassed persons, were protected.

Poignantly, this was not the first time that Rhodes students had tried to bring attention to the twinned phenomena of prolific rape, on the one hand, and general impunity, on the other. For example, in 1999 the Student Advisor and Assistant Dean of Students at Rhodes stated that ‘[q]uite frankly, women are often at fault, because sometimes when they say no, they mean yes.’ A year later, a first-year Rhodes student was gang-raped. The student took all the steps with regards to the criminal justice system, including obtaining a doctor’s report and a police report, all of which confirmed that she had been raped. While the University was initially sympathetic, it never took a statement from her or asked her to submit a report. As time passed, the student experienced hostility from the University staff and, eventually, staff questioned whether in fact, the rape had actually taken place. The University’s website allegedly described first-year women students as ‘seals’ that are ripe for ‘clubbing’ (a euphemism for older male students aggressively pursuing sexual contact with younger women). The University’s messaging regarding alcohol abuse also led to victim-blaming. The implicit messaging was that, had the victim been sober, she would not have been raped. It also exculpates the University structures for failing to ensure that the University campus is safe for women. This messaging shifts the blame onto the victim, away from the perpetrators and away from the University.

Students were discouraged from reporting rape as prosecuting such cases would not be ‘worthwhile … as their evidence is insufficient.’ Survivors of sexual assault, as opposed

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42 ‘Chapter 2.12’ refers to the section of the Constitution that guarantees every person the right to safety and security.
43 Pilane (note 41 above).
44 The wheels of change turn slowly — if at all — the world over. See MJ Anderson ‘Campus Sexual Assault Adjudication and Resistance to Reform’ (2016) 125 The Yale Law Journal 1940.
45 De Klerk, Klazinga & McNeill (note 4 above) at 120.
46 Ibid.
47 Founding Affidavit of Dominique McFall in Dominique McFall v Rhodes University, Sizwe Mabizela NO & Wayne Hutchinson NO (date unknown. It is not clear whether this application has progressed), available at https://www.seri-sa.org/images/McFall_Founding_Affidavit_final.pdf
48 The notion of victim-blaming and its consequences are explored admirably in M Nissim-Sabat Neither Victim nor Survivor: Thinking Toward a New Humanity: Thinking Towards a New Humanity (2009).
49 De Klerk, Klazinga & McNeill (note 4 above) at 122.
50 Ibid.
to rape, felt that their cases were not treated seriously ‘because (they) did not fit the typical narrative of rape’.52 There was clearly a staggering lack of knowledge about sexual violence and how it manifests, leading to silencing and excision of victims and their experiences. This is evident in the following example of a student who reported sexual assault:

She was told that the burden of proof was on her, and because she did not contact the police within 24 hours, it was going to be a problem to prove sexual assault. Management instead suggested a roundtable discussion with her perpetrator (Anonymous, 2017).53

The policy itself was also problematic.54 Journalist Pontsho Pilane explains how the sexual harassment policy would almost always result in a finding of not-guilty:

The Rhodes University sexual offences policy defines rape as an ‘unlawful and intentional act of sexual penetration with another person without that person’s consent.’ At first glance, this definition seems legitimate. But how do those who have been violated prove this intent? ‘How is a victim supposed to know that their (sic) rapist intends on raping them when the rapists themselves do not acknowledge their act is rape?’ … Because the victim has to prove intent, the onus is on them to make sure that the violation did happen. The victim has to relive the rape for it to be believed. They must concern themselves with the details of times, dates, location and how they found themselves in the situation to begin with.55

The combination of an impossible policy and an estranged administration led to the protesters’ plea:

We just want to be able to walk home safely. We just want to be able to have relationships secure in the knowledge that our partners won’t rape us. We should not have to avoid university tutorials because the tutor is a known rapist. We should not be afraid to go to lectures because rapists will be there. We just want safety and security of person, as Chapter 2, Section 12 of the Constitution guarantees us.56

The messaging of victim-blaming, shaming and silencing, therefore, is historic at Rhodes; and it was this in particular that caused the anger on campus.57

In April 2016, members of the Chapter212 movement began a poster campaign highlighting the extent of rape culture at Rhodes.58 The posters depicted University responses to the issue of sexual violence and included the following indictments:

‘Girls need to learn how to be firmer when they say no’;
‘You’re a foreigner ruining a South African’s life’;
Victim: ‘I would like to report an assault’. RU Management: ‘Sorry, the person who handles that isn’t here, would you like to come back next week?’
‘Are you sure you want to go through with this? You’ll ruin his reputation.’
‘Girls shouldn’t get drunk or else they will be raped.’ — RU Management59

53 Bashonga & Khuzwayo (note 41 above) at 40.
54 Ibid.
55 Pilane (note 41 above).
56 Haith (note 51 above).
58 ‘Chapter 2.12’ refers to the section of the Constitution that guarantees every person the right to safety and security.
The University took down the posters, reaffirming the silencing of discussions about gender-based violence. The next day they were re-posted. The silencing of the protesters — who were protesting the silencing of persons who experience sexual violence — led to an escalation of tensions and frustrations.

A few days after the poster campaign, the ‘RU Reference List’ was published anonymously on Facebook. The list contained the names of 11 men. It is important to pause here for a moment to reflect on the way the list was described in the media. It was said that Rhodes students had released a list of 11 men, accusing them of having committed rape. This is, in fact, incorrect. The list certainly named 11 men, but that was all it did. It said nothing about sexual violence; no allegations were made. The list was a list of names. When it went viral, however, people connected the dots between the men; all had been accused of, or were known to have committed, rape. The fact that the list did not link the names to allegations of anything, let alone sexual violence, is not the way the narrative has been framed. Rather, the list has become emblematic of the debate about naming and shaming, and accusing people who may be innocent. The authors of the list knew that they did not need to make any allegations precisely because everyone knew about the allegations. This in and of itself confirmed that the University had endorsed rape culture: everyone knew what these men had been accused of doing; nothing had been done about it. But the list itself made no accusations.

The publication of the list and the realisation that it was a list of men accused of rape, led to organised student action. The students entered men’s residences to round up the accused to take them to the police station. This continued over a period of several days and nights. Some male students were apparently ‘seized by the crowd, assaulted, threatened and humiliated’.

In particular, two male students were allegedly held against their will overnight and subjected to assault and abuse. The University’s response was multifaceted and included bringing police onto campus. The University’s rationale was that, while it defended the right to protest, it categorically would not tolerate violence and intimidation. This position is not, in itself, contentious. However, it stands as evidence of the University’s contradictory approach to violations of its policies that so saddened and angered the protestors. They and hundreds of women before them had experienced violence and intimidation and the University had tolerated it; accepted it and refused, through a combination of sexist attitudes, inertia, ineptitude and reputational protection, to take action. Yet, when men were allegedly attacked or called out for their violence, the University’s response was immediate, decisive and effective. The protests were shut down, and the protest leaders punished. There really could be no sadder confirmation of the message of despair and anger that the protestors were trying to impart.

The prioritisation of the accused’s interests over those of the victims was re-enacted by the University when commenting on the release of the list:

61 Gouws (note 3 above) at 4. Pilane (note 41 above).
63 Rhodes University v Student Representative Council of Rhodes University & Others [2016] ZAECGHC 141; [2017] 1 All SA 617 (ECG).
The release of this list was labelled by the Rhodes University Vice Chancellor as ‘a violation of their [the alleged offenders] rights’ (Johnston, 2016:7). This statement, although legally sound, forms part of the basis of why students perceive management as favouring the rights of offenders over those of victims.64

The University also obtained an interdict against, inter alia, three protestors who were alleged to have participated in the abduction.65 The interdict prohibited the students from engaging in the type of protest action in which they had been involved. The focus of the judgment was on the veracity of the claims made by the University, i.e. did the protestors abduct the men and lead the disruption that characterised the movement. Very little was mentioned about the issue of rape and the fact that the protestors had been silenced for so long, and had tried so many avenues to gain the attention of the administration, that they felt they were left with no option.

The court rejected the notion that the student protests and conduct were proportionate to the pain and suffering they had experienced because of rape impunity. It granted the interdict and the students were silenced. The court repeated the very silencing of victims that had led to the protests.

The matter did not end there. Students Yolanda Dyantyi and Dominique McFall were charged and found guilty by the University of kidnapping and insubordination. Yolanda Dyantyi was also found guilty of assault and engaging in offensive/defamatory conduct. The two were excluded from the university for life.66 As regards Yolanda Dyantyi, no credits from any other university would count towards any qualification issued by the University. Her university transcripts would be endorsed to read ‘Conduct Unsatisfactory — Student permanently excluded for: Kidnapping; Assault; Insubordination; Defamation’. She had to vacate the premises by close of business on the date of the order and was not allowed to attend the campus for the duration of the exclusion, i.e., for life. The students were precluded from writing any outstanding examinations.67 It remains unclear whether or not the excluded students were involved in the ‘abduction’: both denied it, and it has never been proven. The result is that ‘McFall and Dyantyi, both final year students at Rhodes this year, will never be able to graduate with the degrees that they have been studying toward at the University.’68

Contrast this to rape cases in which the accused students were found guilty. In one instance, the perpetrator was excluded for five years, in another, for one year. In 2007, a student found guilty of rape was supposed to be sentenced to permanent exclusion but ‘the Proctor felt that students should be given every opportunity to reform, and excluded him from Rhodes for five years, as well as ordering him to pay all medical costs. He was given 24 hours to leave.’69 In May

64 Bashonga & Khuzwayo (note 41 above) at 38.
65 Rhodes University v Student Representative Council (note 63 above) at para 1. For an analysis of the case from the point of view of the criminalisation of the right to protest, see SA Karim & C Kruye ‘Rhodes University v Student Representative Council of Rhodes University The constitutionality of Interdicting Non-Violent Disruptive Protest’ (2017) 62 SA Crime Quarterly.
66 Rhodes University v Student Representative Council (note 63 above).
69 De Klerk, Klazinga & McNeill (note 4 above) at 123.
2016, following the initiation of the protests, a student found guilty of rape by the University was excluded for ten years.\textsuperscript{70}

The reality is that there is a significant difference between the punishments meted out. Those who rape receive far lower sentences than those who have tried to address impunity for rape. This imbalance in sentencing confirms the very reason why the protests began in the first place. As soon as women exercised force to challenge their rapists and the absent university management, they met a punishment of the most extreme nature. The rapists did not. The messaging is clear: raping a woman is less serious than holding an alleged rapist overnight.

At the end of 2016, a University-established Sexual Violence Task Team released a report proffering a range of recommendations to deal with the past systemic violations and to prevent future harm.\textsuperscript{71} Some of these recommendations were adopted; others were not.

Two years later, however, it appeared that little had changed. In August 2018, Khensani Maseko, a student at Rhodes committed suicide after reporting to the University at the end of July that a fellow student had raped her in May.\textsuperscript{72} The alleged perpetrator was suspended three days after Khensani died.\textsuperscript{73} No information is available about the status of the case.

The tragedy of the story of Rhodes is as disempowering as it is infuriating. It reveals starkly how institutional conservatism, lack of courage and lack of empathy have neutered the processes designed to achieve accountability for sexual harassment.

D Fear of identification

Another reason why disciplinary procedures fail persons who experience sexual harassment is that the processes themselves are traumatic. Many targets of sexual harassment do not make formal complaints because they do not want their identity revealed. A recent study of sexual harassment in medical schools in the United States identifies some of these reasons:

Barriers to reporting sexual harassment include a fear of not being believed, embarrassment if peers learn of the harassment, a lack of trust in those who are in positions of authority, and a belief that these behaviours are a necessary part of becoming a physician. A recent report described female physicians who had been harassed and remained silent because they questioned their self-worth after their experiences and wondered whether they brought it on themselves. They also feared being labelled as troublemakers.\textsuperscript{74}

If one appreciates the fact that sexual harassment almost always occurs against the backdrop of asymmetrical power relations, it is clear that a potential complainant may fear the backlash of the organisational structure as a whole. She may be fearful — and correctly so — that she will be vilified and demonised in her workplace. There is every likelihood that she will become a pariah and identified as a troublemaker.

\textsuperscript{70} R Pather & S Smit ‘#RhodesWar Students’ Battle Revealed In Internal Disciplinary Documents’ (14 December 2017) Mail \& Guardian, available at https://mg.co.za/article/2017-12-14-rhodeswar-students-battle-revealed-in-internal-disciplinary-documents/.

\textsuperscript{71} Rhodes Sexual Violence Task Team (note 11 above).


\textsuperscript{74} R Binder; P Garcia; B Johnson; E Fuentes-Afflick ‘Sexual Harassment in Medical Schools: The Challenge of Covert Retaliation as a Barrier to Reporting’ (2018) 93 Academic Medicine 1770, 1772.
While the hashtag movements have created power in the public narrative, they have not protected persons from retaliation. While ‘those who speak up are much safer today than they were before the movements took hold in situations where a decision-maker harbours retaliatory animus,’ there remains the fear that, if the complaint is unsuccessful, the harassment will intensify.

The Constitutional Court recognised this in the case of *Levenstein & Others v Estate of the Late Sidney Lewis Frankel & Others.* In this case, the eight applicants were men and women who alleged that they were sexually assaulted by Mr Frankel between 1970 and 1989, when they were between the ages of 6 and 15. Between June 2012 and June 2015 when the applicants fully appreciated the gravity of the criminal acts committed by Mr Frankel they opened a criminal case and instituted a civil claim against Frankel, who was alive at the time. The Director of Public Prosecutions declined to prosecute on the grounds that the crimes Mr Frankel was accused of having committed more than 20 years earlier had prescribed in terms of s 18 of the Criminal Procedure Act 51 of 1977 (the CPA). In August 2016, the applicants approached the High Court for an order declaring s 18 of the CPA to be invalid. The High Court granted the order. Mr Frankel died in April 2017. Some six months later the matter came before the Constitutional Court for confirmation of the High Court’s declaratory order. Inter alia, the Court addressed the reasons why some complainants of rape may wait many years to report their abusers:

> Of pivotal importance to the case before us is this: that the systemic sexual exploitation of woman and children depends on secrecy, fear and shame. Too often, survivors are stifled by fear of their abusers and the possible responses from their communities if they disclose that they had been sexually assaulted. This is exacerbated by the fact that the sexual perpetrator, as the applicants alleged Mr Frankel to have been, is in a position of authority and power over them. They are threatened and shamed into silence. These characteristics of sexual violence often make it feel and seem impossible for victims to report what happened to friends and loved ones — let alone state officials. Combined with this is the frequent impact of deeply-located self-blame, which … disables the victim from appreciating that a crime has been committed against her for which the perpetrator, and not she, is responsible.

For these reasons, it is necessary to consider the need for anonymous complaints. Anonymous complaints compromise one of the basic principles of natural justice, namely the right to face one’s accuser. The question then is how to address the need for anonymity without diluting the value of this principle.

The problem of anonymity was at the heart of the investigation into one of the leaders of a social justice organisation, Equal Education. The co-founder of the movement faced several accusations of sexual harassment. These accusations were made public by an anonymous report in a national newspaper, resulting in the establishment of a commission of inquiry to investigate the allegations.

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76 *Levenstein & Others v Estate of the Late Sidney Lewis Frankel & Others* [2018] ZACC 16; 2018 (8) BCLR 921 (CC); 2018 (2) SACR 283 (CC). *L & Others v Frankel & Others* [2017] ZAGPJHC 140; 2017 (2) SACR 257 (GJ) at paras 13–15.

77 *Levenstein v Estate Frankel* at para 56.

Throughout the inquiry, the complainants refused to be named. One of the reasons for the demand for anonymity was that there was a culture of impunity within the organisation and that senior members of the organisation had protected the co-founder from previous complaints.79 The organisation, therefore, was itself a source of fear. The complainants feared that they would be removed from the organisation and, given the insular nature of the social justice world in South Africa, that they would not be able to work in the sector again.

A three-member panel was established to investigate these claims. Two of the three panellists, Judge Satchwell and Dr Langa, found that there was no evidence to confirm that the co-founder was guilty of sexual harassment or that there had been a cover-up of sexual harassment claims in the past. This was so notwithstanding the evidence of 19 anonymised complainants. One of the bases for this finding was that the complainants refused to reveal their identities to the panel. The report of the two panellists was scathing about the complainants’ insistence on anonymity. It took the view that in the absence of named complainants, there was ‘no evidence of sexual harassment, and no complainants came forward.’80 This is not a representation of the truth. There was evidence of sexual harassment, and complainants did come forward. The anonymity did not mean that no-one came forward. It means that no one identified themselves. This statement wipes from existence every complainant on the basis that they did not feel safe enough to reveal their identities.

In the majority report, Satchwell spoke about the difficulty of not being able to interrogate the written versions of the complainants. This is a legitimate concern: anyone who has sat as an adjudicator knows the importance of questioning people about their complaints (and the responses thereto). I do not understate the importance of this. The report spent some time discussing the issue of anonymity. In its discussion, however, the report reproduced the vitriolic anger that complainants of sexual harassment typically face:

But I do believe that it is necessary to express my greatest concern, serious disquiet and even disgust at persons who hide behind anonymity for themselves when making grave and reputational destroying allegations against persons whom they freely name and shame and deny the same opportunity for privacy before any investigation into the truth or otherwise of these allegations is conducted.81

In contrast to her disdain for the victims, Satchwell painted the leaders of Equal Education as victims, who were the subject of ‘an attempt to destroy good names and reputations without even a hearing or to confront the substance of any allegation.’82

I query the reason why the panel was not able to create a procedural context that would have allowed and encouraged the complainants to meet with them. This point was raised in the independent report by Professor Manjoo:


82 Ibid at para 98.
A crucial question is whether we effectively exercised a duty of care and worked within an ethic of ‘do no harm’ to uncover facts that would provide prima facie evidence of patterns of behaviour, which have led to a fractured organisation that seems unable to deal with allegations that continue to haunt it.83

The complainants were open to being asked questions about their complaint via their legal representatives and in writing.84 In light of the typical trauma that accompanies interrogating complainants in complaint proceedings, it is not unsurprising that the complainants did not want to expose themselves to this level of trauma. It is also not clear why the two panellists could not at least describe the content of the complaints in their report, noting that they had not been subject to interrogation or verification. This is in fact, what the dissenting panellist, Professor Manjoo, did in her independent report, stating that:

what is a loss for the social justice sector, was the opportunity to substantively address issues of power, privilege, patriarchy, racism, sexism, classism and social status, including the intersections, among others, in our quest to understand the silences of women whose dignity, privacy, and bodily integrity rights are violated, and to have empathy for their consequent requests for protective and participatory measures. During this process, the overwhelming need was for vindication, and not necessarily the best interests of women and/or EE [Equal Education].85

We see in the different reports a clear jostling of two seemingly countervailing positions. On the one hand, is the robust and important protection of the constitutional principles of fair process. On the other hand, there is the seminal insight into the fact that ‘fair process’ might be unfair when it comes to sexual harassment. As Manjoo noted:

An inquiry that is set up to seek information on sexual violence broadly, including sexual harassment, will by necessity have to be victim-responsive, taking into account issues of vulnerability of complainants who choose to participate and exercise agency. Respecting the rights of all parties, including those accused of wrongdoing, does not preclude a greater focus on protecting the interests of the victims of sexual harassment, intimidation and bullying.86

An organisation can no longer pivot its response to sexual harassment around the individual complainant. This is especially so given the increasing attention to vicarious liability on the part of organisations for their failure to address sexual harassment.87

E The ‘good’ and ‘bad’ witness

Formal workplace disciplinary procedures replicate courts. As is the case with judges, disciplinary procedure adjudicators will determine the veracity of a complainant’s story with reference to her behaviour. Does she look and act like a good witness?

Witness demeanour is mandated by South African law. Judges are enjoined to adjudicators to determine the veracity of a witness’s testimony based on their demeanour when giving evidence. In R v Dhlumayo, the importance of a witness’s appearance, demeanour, and personality became central to the determination of guilt.88 The SCA referenced the fact that

84 Satchwell & Langa (note 81 above) at para 59.
85 Manjoo (note 83 above) at 6.
86 Ibid at 8.
87 Gaga v Anglo-Platinum Ltd 2012 33 ILJ 329 (LAC); Media 24 (note 39 above); Grobler v Naspers Bpk en n’ Ander 2004 (4) SA 221 (C); E v lkekwezi Municipality 2016 37 ILJ 1799 (ECG). See Krieger (note 30 above).
88 R v Dhlumayo 1948 (2) SA 677 (A) at 706. See also S v Heslop [2007] 4 All SA 955, 2007 (1) SACR 461 (SCA) at 472c.
one of the complainants was a good witness in that ‘She was unshaken in cross-examination’.\footnote{Eggleston v The State (297/2005) [2008] ZASCA 77 (30 May 2008) at para 21.}

Similarly, Smythe’s research into policy attitudes to sexual violence cases, reveals an entry into an investigating officer’s case note as follows:

the case was closed abruptly with a note from the prosecutor that the complainant had deviated substantially from her statement. Written boldly across a number of lines in the investigation diary is the note: “VERY BAD WITNESS AND CASE!!” the investigating officer followed up with the annotation: “Case withdrawn because the complainant lied”\footnote{D Smythe Rape Unresolved: Policing Sexual Offences in South Africa (2015) 156–157}.

So, what makes a good witness? Typically, we tend to judge veracity with reference to a person’s ability to look you in the eye; to be clear and articulate in the wrong they have experienced; to have a perfect recollection of the events that occurred; and to be certain that they have a legitimate right to be in court asking for assistance. The notion of witness demeanour has been described as —

the tone of voice in which a witness’ statement is made, the hesitation or readiness with which his answers are given, the look of the witness, his carriage, his evidences of surprise, his gestures, his zeal, his bearing, his expression, his yawns, the use of his eyes, his furtive or meaning glances, or his shrugs, the pitch of his voice, his self-possession or embarrassment, his air of candour or seeming levity.\footnote{JA Blumenthal ‘A Wipe of the Hands, a Lick of the Lips: The Validity of Demeanor Evidence in Assessing Witness Credibility’ (1993) 72 Nebraska Law Review 1157, 1164.}

These forms of conduct, however, are very often absent in sexual harassment cases.\footnote{RA Schuller, BM McKimmie, BM Masser & MA Klippenstine ‘Judgments of Sexual Assault: The Impact of Complainant Emotional Demeanor, Gender, and Victim Stereotypes’ (2010) 13 New Criminal Law Review: An International and Interdisciplinary Journal 759. See also Blumenthal (note 91 above).} Merely being in physical proximity to an abuser may trigger physical responses to the trauma of past harassment.\footnote{For a discussion of this phenomenon in the context of sexual assault of children, see PC Regan & SJ Baker ‘The Impact of Child Witness Demeanor on Perceived Credibility and Trial Outcome in Sexual Abuse Cases’ (1998) 13 Journal of Family Violence 187.}

This is akin to the trauma of, for example, a car accident: every time one passes the scene of the accident, one trembles or one’s heart rate increases. The body remembers the harm and responds accordingly. For a person who has experienced sexual harassment in her work, that space is the paradigmatic site of the near-fatal car accident.

Even if the complainant does not have to face her harasser, the resurrection of the harm itself is traumatic. It triggers several physiological responses that are in stark contrast to the notion of a ‘good witness’. For example, it will be difficult for some complainants to look the adjudicators or legal representatives in the eye when talking about the harassment. The harassment may be intimate and, as discussed above, often accompanied by shame and a disharmony about one’s role in triggering the harassment. This emotional quagmire may also manifest in a low and unconfident voice, a nervousness in tone and bodily expression, and a reluctance to discuss all the details of what happened.\footnote{P Easteal & K Judd “‘She Said, He Said’: Credibility and Sexual Harassment Cases in Australia’ (2008) 31 Women’s Studies International Forum 336, 337.} These features are the hallmarks of a non-credible witness. In truth, however, they confirm the claim of sexual harassment. Anyone schooled in the area of gender-based violence will understand that the apparent uncertainty of a complainant is not evidence of falsehood, but rather, it is potential evidence of truth. Of course, not all complainants testify in this manner, and some are confident and fit the usual

\footnote{P Easteal & K Judd “‘She Said, He Said’: Credibility and Sexual Harassment Cases in Australia’ (2008) 31 Women’s Studies International Forum 336, 337.}
mould of a ‘good witness’. The absence of physiological trauma should not be used against a witness. This would be nonsensical. My point rather is that adjudicators of sexual harassment complaints should be trained to understand that traditional beliefs of good witness demeanour may be misleading. The inverse is true: being a ‘bad’ witness may well be a sign of the veracity of the testimony.

I note an important caveat. It is essential that my recommendation should not be confused with condonation of the idea that there is a typical victim of sexual harassment who should behave in a standard way. Not all persons who experience sexual violence experience the physiological complexities described above. My point only is that one cannot impose an assumption of ‘good witness’ demeanour on sexual harassment complainants. In addition to the complicated physiological reactions of a sexual harassment complainant, there is the intransigent patriarchy of law, which —

’speaks to men while it alienates and excludes women’. Therefore, when we look at how credibility is assessed within the criminal justice system, we must recognise that it is subjectively determined and measured through a series of patriarchal lenses.95

F The false complaint/witch-hunt

A common backlash to sexual harassment claims is that they are false and are acts of retribution for a rejected promotion or a spurned romantic overture. This is why procedural fairness is so important. If there is a false claim, so the narrative goes, then this will be unearthed when the perpetrator faces and challenges his accuser. My recommendation that the employer may be the complainant and/or a witness appears to deny the accuser of this opportunity. As I describe below, this is not the case. However, it is important to review the spectre of false claims.

The typical trope is that women make false accusations in order to ruin a person’s career, to garner economic benefits, or to take revenge for a grievance for which the accused may have been responsible. Ironically, this response suggests that women have the power to ruin a person’s career simply by making the allegation of sexual harassment. The reality is different. More often, it is the complainant who finds herself ostracised from her field of work, irrespective of whether or not she is successful in her claim. There is no real power on her part at all. The opposite is true: one of the most devastating aspects of sexual harassment is how disempowering it can be.

We, therefore, see a complete disjuncture between the lived reality of women in the workplace who experience sexual harassment, on the one hand, and the perception of complainants on the other. Women in the workplace report feeling fear, alienation and sexism in the workplace, whereas the popular narrative is that women are vindictive, powerful and opportunistic in making false complaints.

In her seminal piece on policing sexual violence in South Africa, Dee Smythe reports the view of police that:

an inordinate number of rape complaints received by them are false and suggest that in certain communities this has become a commonplace means of exacting revenge on male partners (past or present).96

95 Ibid at 337.

96 Smythe (note 90 above) at 5.
There is no doubt that there are false claims of gender-based violence.\(^97\) The issue, however, is the erroneous perception that it is so common. While statistics are difficult to produce, given that there are so many different interpretations of what constitutes a false claim, it is clear that the number of false claims of sexual assault is minimal. Most sources report that false claims constitute between 2–10% of all reported cases of sexual assault.\(^98\) This is certainly no more than false claims about other offences. As Schwikkard notes in respect of rape complaints, ‘[t]here is no empirical data showing that more false charges are laid in respect of sexual offences than in any other category of crime.’\(^99\)

If there is no evidence of mass false reporting, why is this the standard belief in response to complaints about gender-based violence? Once again, we can see how law distrusts women. In 1949, the then Chief Justice posited that one of the reasons women would lay false charges of rape, is if they become pregnant as a result of a consensual affair:

Where pregnancy has supervened and in that way it has become necessary for the girl to explain her condition, she may be tempted to shield some young friend who is the actual wrongdoer and to implicate someone of relatively sound financial standing who may be better able than the actual father of the child about to be born to provide it with maintenance.\(^100\)

The fascination with the stereotype that women are duplicitous and untrustworthy is evident today. In 2018, Christine Blasey Ford accused Supreme Court nominee Brett Kavanaugh of sexual assault. Ford, an American professor of psychology at Palo Alto University and a research psychologist at Stanford University School of Medicine, was both hero and demon.\(^101\) Ultimately, she was unsuccessful. In the wake of the allegation, President Trump stated what so many people believe:

It’s a very scary time for young men in America, when you can be guilty of something that you may not be guilty of… Think of your son. Think of your husband.\(^102\)

\(^97\) Ibid at 142–154.

\(^98\) C Spohn, C White & K Tellis ‘Unfounding Sexual Assault: Examining the Decision to Unfound and Identifying False Reports’ (2014) 48 Law & Society Review 161, noting that a “multi-site study of eight U.S. communities including 2,059 cases of sexual assault found a 7.1 percent rate of false reports. A study of 136 sexual assault cases in Boston from 1998-2007 found a 5.9 percent rate of false reports (Lisak et al., 2010). Using qualitative and quantitative analysis, researchers studied 812 reports of sexual assault from 2000-2003 and found a 2.1 percent rate of false reports (Heenan & Murray 2006). https://www.evawintl.org/Best-Practices/FAQs#Answer69: “While there is a wide range of figures in the literature, methodologically rigorous research shows that the estimated range of false reports is between 2-8%. These studies include: The “Making A Difference” (MAD) study of approximately 2,000 cases from law enforcement agencies in eight communities – 7.1% false; David Lisak and colleagues’ (2010) study of reports made to a university police department – 5.9% false; A review of sexual assault cases reported to the Los Angeles Police Department (Spohn, White, & Tellis, 2014) – 4.5% false; British police cases reviewed for compliance with the official criteria for false allegations (Kelly, Lovett, & Regan, 2005) – 2.5% false.’.


\(^100\) R v With 1949 (3) S A 772 (A) at 780 and 781.


This is not only the sentiment of a rambunctious and widely discredited president. In his opinion piece in the *New York Times*, veteran and respected journalist, Bret Stephens, wrote about the President’s comments. He described how a friend remarked that

‘I’d rather be accused of murder,’ he said, ‘than of sexual assault.’ I feel the same way. One can think of excuses for killing a man; none for assaulting a woman. But if that’s true, so is this: Falsely accusing a person of sexual assault is nearly as despicable as sexual assault itself. It inflicts psychic, familial, reputational and professional harms that can last a lifetime. This is nothing to sneer at.\(^{103}\)

False reporting is harmful, but it can hardly be equated to the harm of sexual assault, especially where this white, wealthy American man will likely never experience gender-based violence. As noted by the South African High Court thirteen years prior, ‘the ability of a judicial officer such as myself to fully comprehend the kaleidoscope of emotion and experience, of both rapist and rape survivor, is extremely limited.’\(^{104}\)

The fetishisation of false reporting is disturbing, given that the airtime it receives in the public discourse is entirely disproportionate to its occurrence. In addition, there is an unhappy conflation between the notion of a false claim, a failed claim and a withdrawn claim.\(^{105}\) Women experience victimisation, demonisation and exhaustion at having to simultaneously deal with the trauma of the event and withstand the onslaught of aggression as a result of her complaint.\(^{106}\) Given the disjuncture between the harm and the law, there is a high likelihood that the legal system is unable to find that sexual harassment occurred or that the complainant withdraws the complaint. This does not mean that the event did not occur; it means only that there was no acceptable evidence to prove that the harm occurred. The common narrative, however, is that an unsuccessful claim equates to a false claim.\(^{107}\)

Therefore, it is easier to believe in the fiction of the false report than in the veracity of claims of sexual violence. This is at the heart of the deficiencies in the workplace disciplinary procedures.

### IV PROPOSED PROCEDURAL CHANGES

The need to reform procedures is not only a project of equality. Organisations should see it as an act of self-interest. It has been argued that both formal complaints and ‘readily observable harassment in the workplace’ trigger a duty to respond.\(^{108}\) In *Media 24*, the Supreme Court of Appeal held that organisations have an obligation to ‘take reasonable steps to prevent sexual harassment of its employees in the workplace and to be obliged to compensate the victim for harm caused thereby should it negligently fail to do so.’\(^{109}\)


\(^{104}\) *Holzhauzen v Roodt* 1997 (4) SA 766 (W) at 778.

\(^{105}\) Smythe (note 90 above) at 142, discussing the definitional problems of false complaints.

\(^{106}\) Ibid at 5 (Smythe notes how ‘direct or indirect intimidation forces complainants to withdraw charges’).

\(^{107}\) Ibid at 142

\(^{108}\) Grossman (note 4 above) at 15–16.

\(^{109}\) *Media 24* (note 39 above) at para 68. See also *Minister van Polisie v Ewels* [1975] ZASCA 2, 1975 (3) SA 590 (A) at 597A–B; *E v Ikhwezi Municipality & Another* [2016] ZAECHGC 20; [2016] 2 All SA 869 (ECG); [2016] 37 (ILJ) 1799 (ECG); *Motsumai v Evrite Building Products (Pty) Ltd* [2011] 2 BLLR 144 (LAC), [2010] ZALAC 23. For a discussion of the principles of vicarious liability for sexual harassment in South Africa, see Calitz (note 25 above).
As discussed, the process is one of the weakest links in achieving accountability for sexual harassment. As artfully noted by one commentator on the Equal Education inquiry:

Although apprehension regarding the departure from accepted natural justice procedures is generally understandable, those interested in genuine justice should be equally concerned about the reality that, in the absence of such protection, the complainants would not have come forward at all. What sort of justice would that be?  

Without an effective investigatory and disciplinary process, there can be no punishment. We are left with a quagmire. The existing disciplinary process has been designed to address a certain form of harm that applied by and in an all-male workplace. It addresses insubordination, fraud, theft and non-performance, for example. These are relatively objective, visible and provable infractions of the workplace rules. When women entered the workplace, they were met — and still are met — with the twin evils of harassment and a disciplinary system that is simply not designed to deal with harm arising from that harassment. It is against this backdrop that I make the following recommendations.

A Reconceptualising the use of anonymous complaints as evidence

If organisations are serious about addressing sexual harassment, they need to re-sculpt their disciplinary procedures to be responsive to the reality experienced by the person who was harassed. It is necessary ‘to adopt substantive legal standards in analysing complaints [rather than] apply a general concept of fair treatment to all claims’.  

Sexual harassment is different; so too should be the responses. The difficulty is how to change the system without sacrificing procedural fairness. I propose two alternatives. The first is that anonymous complaints may be admissible in certain circumstances. The second is that the management of an organisation itself could be the complainant.

The first is that anonymous complaints may be admissible where they are used to substantiate a named complainant. There should be an opportunity for an adjudicatory panel to interrogate the content of the anonymous complaints via written questions to the complainants, who would then be required to respond in writing. The anonymous complainants should also explain their reasons for anonymity as far as possible. This, of course, should be treated with circumspection. It departs from a basic premise of procedural justice and should be treated with caution. However, that does not mean it cannot be considered at all.

There is an important caveat to the utilisation of anonymous complainants. Many persons do not want the detail of their experiences to be told for fear that the specifics of their stories will enable the perpetrator to identify them. So anonymous complainants are further weakened


111 Interestingly, when sexual harassment cases are successful, the most common backlash is an attack on procedural fairness. It is therefore essential to demonstrate how disciplinary proceedings are structurally unfair vis-à-vis complainants and to consider how these may be revised in a manner that is consistent with fairness and transparency.

112 Grossman (note 4 above) at 63.

113 One option is to develop a type of class action equivalent for the workplace. This has occurred in the United States: Jock v. Sterling Jewelers Case No. 11-20-0800-0655, (Am. Arb. Ass’n 2015).
by the fact that they are probably going to contain high-level allegations, devoid of specific
details such as dates, times and locations.

My argument is that this evidence should be admissible to an adjudicatory panel. The
panel might — and should — treat this evidence with caution because the perpetrator is
not able to defend himself against vague allegations. However, this procedural compromise
should be weighed against the fact that most women have no incentive to — and indeed have
evvery reason not to — bring formal complainants. This amounts to the workplace denying
complainants the right to access a form of justice.

So, there are two procedural deficiencies. One the one hand, denying a perpetrator an
opportunity to face and interrogate his accusers is serious. On the other hand, denying persons
the right to bring proceedings against perpetrators of sexual harassment, is equally serious. The
right to face your accuser is stacked against the right to access justice. This can be ameliorated
by curtailing both rights, in a sense. The right to face an accuser is justifiably limited because
of the institutional embargo on sexual harassment complaints, i.e. without this limitation,
there would be no sexual harassment cases. On the other hand, the right of access to justice is
limited because an anonymous complaint must be handled with a great degree of caution and
can only ever be used where there is a formal, identified complainant.

It should be possible to allow persons who have been harassed to give evidence through
an intermediary. The perpetrator would be able to interrogate the version being put to an
adjudicative body without compromising the well-being of that person. Having said that, this
method should be used only in circumstances where the complainant fears severe repercussions,
including threats to her or her family’s safety.

All these approaches require analysis in themselves. Overall, however, they demonstrate how
a disciplinary procedure may be adjusted to cater for the nuances of sexual harassment claims
without compromising the rights of the perpetrator.

B Reconceptualising the complainant

This brings me to the second point. Who is a complainant? The current model of complainant-
centric disciplinary procedures ‘renders largely invisible the organisational employer’s role
in creating a hostile work environment; it magnifies the significance of the victim’s role in
preventing sexual harassment.’114 Relying on individual testimony ‘undermines, rather than
fosters, the deterrence of workplace sexual harassment.’115

In many cases of sexual harassment (although by no means always), there is the knowledge
that a perpetrator sexually harasses persons in the workplace. There are two types of knowledge.
The first is the ‘everyone knows’, general knowledge, emanating from corridor talk about stories
that persons tell of their experience. This has been referred to as the ‘Traditional Whisper
Network, the Double Secret Whisper Network, the Shadow Court of Public Opinion, and
the New Court of Public Opinion’.116

The second is where a person reports sexual harassment to a manager within the organisation
but does not want to lay a formal complaint. This creates actual knowledge. In those instances,
the organisation’s management knows about sexual harassment. In particular, when there are
multiple complaints against a perpetrator reported to management over a period of time, the

114 Lawton (note 31 above) at 846.
115 Ibid at 855.
116 Tuerkheimer (note 24 above) at 1150.
management develops knowledge of the perpetrator’s conduct. Management itself could then become the complainant and/or witnesses in a case against a perpetrator, even if no other complainants want to come forward.

This would constitute indirect evidence and, technically, hearsay. Organisations typically rely on the persons to give evidence because they need a ‘full proof’ case. However, the truth is there is no such thing as a full proof case. Even if complainants do give evidence in disciplinary proceedings, this testimony, coupled with an alienating procedure and further harassment by the perpetrator, may lead to a withdrawal of charges. Bias or ignorance on the part of an adjudicator may lead to the conclusion that there is not enough ‘hard’ evidence to dismiss the perpetrator. In other words, the current procedural structure that centralises the complainant’s evidence in proceedings is not full proof. An alternative is needed: the evidence of management that over a period of time, a number of reports of sexual harassment by the perpetrator came to their attention, is a form of evidence. This evidence may not convince an adjudicatory panel but that is not a reason not to submit the information as evidence.

I should note categorically that this suggestion must be premised on the basis that the complainant’s needs must take priority. If there is strong opposition from complainants that formal disciplinary procedures are pursued, alternative responses must be used.

The global and national hashtag movements point to a burgeoning set of convictions that impose a stringent obligation on employers to address sexual harassment.\(^{117}\) It is impossible for organisations legitimately to argue that a person’s failure to report sexual harassment or bring a formal complaint is a legitimate reason for abstaining from an investigation.\(^{118}\) This is especially so where an employer knows that a perpetrator exists. As deficient and non-specific as that evidence may be, employers should try this route. If it is insufficient for an adjudicatory panel to make a finding of guilt, so be it. I reiterate that this is often the case even where a person gives evidence. However, if the evidence is delivered not as evidence of the harm itself but rather as evidence of the employer’s knowledge of the harm, a different case is being made. It certainly is an indirect case, but it is still a legitimate case against a perpetrator.

Ultimately, managerial complainants mean that the organisation is taking an institutional response to an institutional problem, and not a one-off aberration. Relying on ‘isolated individual complaints, retroactively, and often after lengthy delays, sexual harassment is treated as aberrant individual wrongdoing, rather than an institutionalised problem of inequality.’\(^{119}\)

C  Reconceptualising admissible evidence

Adjudicative bodies, be they disciplinary tribunals or courts, seek tangible or verifiable evidence. This works well in respect of fraud, for example. Fraud can be proved by objective numbers, balance sheets, bank accounts and audits. Sexual harassment usually lacks such visible and tangible evidence. Typically, the harassment occurs in private, behind closed (and locked) doors.\(^{120}\) Renowned American television anchor, Matt Lauer, had a spectacular fall from grace

\(^{117}\) For a discussion about the liability of schools in the United States for their failure to address sexual violence in schools, see Mackinnon (note 30 above) at 2038–2105.

\(^{118}\) Minarsky (note 32 above).

\(^{119}\) Sheppard (note 4 above).

\(^{120}\) This is by no means the definitional norm of sexual harassment. It encompasses equally incidences of public harassment. See for example, S Zietz & M Das ‘Nobody Teases Good Girls: A Qualitative Study on Perceptions of Sexual Harassment Among Young Men in a Slum of Mumbai’ (2018) 13 Global Public Health 1229.
when he was fired from the ‘Today’ show for multiple claims of sexual harassment. One of the most horrifying aspects of the allegations was the fact that Lauer had a secret button under his desk that allowed him to lock his office door from the inside without going over to the door. As commentators noted, ‘This afforded him the assurance of privacy. It allowed him to welcome female employees and initiate inappropriate contact while knowing nobody could walk in on him.’\textsuperscript{121} This is not an analogy of feeling trapped; Lauer’s targets were physically trapped. By definition, there was no evidence that the alleged harm occurred, other than the person’s report of harassment.

Is it correct, however, that there is no verifiable or objective evidence in sexual harassment cases? I propose that there is evidence in circumstances that typically surround sexual harassment cases. For example, there may be instances where several people have been the subject of harassment by the same harasser. Often the targets of the harassment may not complain or may lay an informal complaint to procure the intervention of management to stop the harassment. In the current workplace regime, there is no mechanism to record these allegations formally or to bring them to the attention of an adjudicatory panel. The result is that an individual will be renowned for sexual predation, but the workplace formally does not record the trends.

This is one example of how procedures around sexual harassment should change. Any allegation of sexual harassment against a harasser, irrespective of whether it is formal, informal, actioned or withdrawn, should be recorded in an employee’s human resources file. These record-keeping requirements are being explored in California where employers are required to maintain such records on their employees’ files. It is precisely this type of record-keeping that would constitute a manager’s evidence before an adjudicatory panel. It also ensures that the perpetrator’s pattern of sexual harassment is brought before an adjudicatory panel. Indeed, organisations should ensure that their disciplinary procedures require adjudicatory panels to take such information into account and not dismiss it simply because it does not relate to the claim at hand.\textsuperscript{122}

If there are multiple claims, this could be submitted as evidence to corroborate the complaints of a single complainant. This is necessary in order to understand the continuum and trends of sexual harassment. It offsets the difficulty of the invisible and ‘invisibilised’ harm and allows for evidence of predatory behaviour. If we were to redesign the disciplinary process to respond to the particular harm of predatory behaviour, numerous complaints against the same person would constitute evidence of predation, shifting the onus onto the accused to prove otherwise. It is not unreasonable to present to an accused with a series of allegations against him for rebuttal.

When a formal but anonymous complaint is then filed, the combination of the anonymous formal complaint and the previous informal complaints should be sufficient to trigger an investigation into the accused.

Let me be clear: I am not proposing that the allegation of one complainant should be dismissed because it is a sole complaint. Nor do I suggest that a multiplicity of complaints


\textsuperscript{122} Mizrahi (note 75 above) at 142.
about one harasser is irrefutable proof of harassment. Rather, the current system of employment relations can be adjusted to harness objective factors relating to a sexual harassment claim in a way that does not compromise fairness.

D Reconceptualising who runs the disciplinary procedure

1 The establishment of an independent specialised sexual harassment office

It is necessary to have an independent unit within an organisation to receive, investigate and prosecute sexual harassment cases. This was the model adopted at Wits University following an investigation into sexual harassment at the University (the author headed the investigation).\(^\text{123}\)

An independent office is necessary for a host of reasons. The first is that organisational units and officers that typically deal with sexual harassment have little knowledge of the harm of sexual harassment. They also are often conflicted. For example, in-house legal units are usually tasked with handling legal matters across an organisation. In cases of sexual harassment, it is often unclear in whose interests in-house lawyers are, or should be, acting. In sexual harassment cases, generally, the primary concern for in-house lawyers is to ensure that the organisation does not get sued by a disgruntled employee. They generally resort to an exaggerated disciplinary process that mimics a court trial. This is what in-house lawyers are supposed to do. However, they cannot simultaneously protect the organisation against potential litigation while also ensuring that sexual harassment cases proceed effectively.

A similar problem arises with human resources and employee relations offices. These offices are responsible for the interests of all employees, including both the person and the perpetrator. Their expertise and frame of reference is employment law. Employment law offers various protections to the employee as well as processes that must be followed in dealing with employment-related disputes. Employment law, however, demands neutrality between parties in sexual harassment that, together with the miscellany of other deficiencies in sexual harassment disciplinary procedures, results in a process that is dysfunctional and unstable.

It becomes functionally impossible to do right by both parties. An independent unit, which is mandated to pursue the needs of the complainant (much like a prosecutor in a criminal case), would be able to drive a process on behalf of the complainant. Trade unions, employee relations and human resources are then able to do the job of ensuring that all parties are treated under governing labour law. The separate office can take the reins of the investigation and prosecution.

An independent and specialised office also addresses the problem that, more often than not, complainants do not know to whom and how to report sexual harassment. There are three essential components of an independent office. The first is a preventative role. A specialised office, staffed with lawyers, social workers and gender specialists, has a much greater chance of creating rules and driving policies that prevent sexual harassment.

The second is an intervention component. A specialised sexual harassment office should include psycho-social specialists who must be the first port of call for complainants. The trauma and fear involved in sexual harassment cannot be under-estimated. Properly trained experts should be available for persons who are dealing with sexual harassment.

The final is an accountability role. An independent office should act much like an independent prosecuting authority. It should be responsible for the investigation into sexual harassment complaints and run both formal and informal complainant procedures. It ultimately should also act as the ‘prosecutor’ which presents its case to an adjudicatory panel.

2 Specialised and independent investigators

It is not unusual that legal and investigatory responses to sexual harassment are managed by people who lack expertise in, or knowledge of, the nuances of sexual harassment. This is in stark contrast to the approach, for example, to cases of fraud. Investigations into fraud often rely on experts in forensic auditing, with sophisticated knowledge of financial fraud and with the skills to investigate the matter appropriately and propose workable solutions.

The same level of specialised expertise is required in respect of sexual harassment. Those investigating sexual harassment must be able to understand that complainants may change their minds about bringing a formal complaint and they should not be pressurised into doing so; that complainants may be fearful of retribution and vilification. They should have the expertise to know what type of information constitutes evidence of harassment, and they should be skilled in the ability to convey this information to an adjudicatory panel in such a way that the panel will understand the nuanced nature of the harm and impose an appropriate sanction.

It is also important that investigators work with psycho-social experts. Such experts can assist the complainant in the difficult and often traumatising process of pursuing a formal complaint. This assists the complainant in navigating and completing the process and helps attenuate the disempowerment that occurs within the context of unequal power and gender relations.

3 Specialised adjudicators

It is equally important that the people adjudicating sexual harassment complaints have a variety of specialisations, one of which is knowledge of gender-based violence. It is not unusual to have specialised adjudicatory bodies. We see this in specialised crimes courts, sexual offences courts, children’s courts and equality courts.

Ideally, a panel adjudicating sexual harassment complainants should comprise at least one legal adjudicator and one adjudicator with a specialisation in gender-based violence. The latter suggestion has been met with concerns that this will prejudice the panel against the accused. This is a false assessment. Experts are essential to understanding the nuances under discussion. The knowledge of such nuances does not eviscerate the ability to make an independent decision. Rather, it ensures that the adjudicative structure is better able to make a decision. The sex of the expert is irrelevant. The fact that an adjudicator is a woman is irrelevant. An assumption that a woman will be able to adjudicate sexual harassment cases because she has some essential understanding of gender is erroneous. The critical criterion is that of expertise. The two should not be conflated.

4 Specialised procedures

In 2014, Wits established the Gender Equity Office (GEO) in response to the findings of an inquiry into whether the University’s functions in relation to gender matters and sexual harassment were too decentralised and fragmented to offer an effective mechanism of
prevention, intervention and accountability.\textsuperscript{124} In addition to the policy and institutional reform, the University also adopted specialised procedures to deal with sexual harassment cases specifically. It is beyond the scope of this article to discuss the full panoply of procedural considerations, but of particular relevance is the role of the investigator. The investigator is required to work with the complainant, interview the perpetrator, prepare a report on their findings and submit that report to the adjudicatory panel and, of course, the person harassed and the perpetrator. The investigator then presents its case to the panel. The panel may ask questions of the persons involved on both sides through the investigator. The perpetrator may also ask questions of the person harassed but must do so through the investigator.

We must liberate ourselves from the assumption that sexual harassment is a non-specialist area. It is a technical, complex and difficult issue to address. Technical experts, therefore, should be the ones to address it.

\section*{V CONCLUSION}

These recommendations are a small incision into the diagnosis and remediation of procedural deficiencies in respect of sexual harassment. As I note in my conclusion, this is part of a much larger analysis. My only purpose is to demonstrate, through the analysis of these three procedural considerations, that (i) workplace disciplinary proceedings are moored in assumptions and workings that mitigate successful outcomes in sexual harassment complaints; (ii) there are ways of developing investigative and adjudicatory procedures that are responsive to the nuanced nature of the harm of sexual harassment and the gendered structures in which it occurs; and (iii) that we can make those adjustments in a measured, defensible and procedurally fair way.

A regular theme in the sexual harassment narrative is that if persons do not lodge complaints, it is impossible to hold perpetrators to account. I challenge this assumption. The status quo is that women are blamed for the violence they experience; blamed when they bring a complaint; and blamed when they do not. This is an impossible situation that demands a review of the way we understand who a complainant of sexual harassment may be.

We continue to see the fetishisation of persons who lodge complaints. The dominant belief is that it is the \textit{target} and not their harasser, who is responsible for an unhappy work environment. The intransigence of gender-based discrimination manifests in a range of tropes that are common to the workplace. When women complain about sexual harassment, the structural response resuscitates a host of biases. Often there is a knee-jerk response that the complainant is exaggerating; that the harm is minimal and should not trigger disciplinary proceedings; that the harassment was consensual; that the complainant initiated the events about which she is complaining; and that complaining about the harm will ruin the accused’s career. Most conventional, however, is the belief that the person cannot prove the harassment and, therefore, she must be lying.

All of these stereotypes have infused the law.\textsuperscript{125} Seemingly neutral and ‘fair’ principles of law and procedure were created by lawmakers and judges who were blind to, or indeed perpetrated, gender-based discrimination and violence. The stereotypes about women, therefore, much like


\textsuperscript{125} For a discussion about the historic definition of rape, see N Naylor ‘The Politics of Definition’ in D Smythe & L Artz (eds) \textit{Should We Consent? Rape Law Reform in South Africa} (2008) 22.
the stereotypes around race, underpin law and procedure. As a result, law and procedure are neither fair nor neutral when it comes to cases of sexual harassment.

The hashtag movements have shattered the legitimacy of these assumptions. The recreation of disciplinary procedures is the indisputable next step. The post #MeToo moment demands that we create tangible and practical replacements for current generic disciplinary procedures. In this article, I propose a few such replacements. I do so with the certainty that there will be a backlash to these suggestions, but equally, I do so with the certainty that at least half the women reading this article will nod their head in recognition of the fallacy of effective disciplinary procedures for sexual harassment cases because they have lived it.
The Constitutional Court on the Rights of Minority Trade Unions in a Majoritarian Collective Bargaining System

STEFAN VAN ECK & KAMALESHE NEWAJ

ABSTRACT: The collective bargaining framework in South Africa as set out in the Labour Relations Act 66 of 1995 is based on the principle of ‘majoritarianism’. Notwithstanding the premise of our legal system, minority trade unions have an important role to play in advancing workers’ rights and have turned to the courts for an endorsement of these rights. In this respect, there are three significant Constitutional Court decisions that form the foundation of this article. The key focus is on exploring the extent to which these judgments advance such rights and, particularly, whether and to what extent the Constitutional Court has developed coherent and consistent principles relative to the rights of minority trade unions.

KEYWORDS: collective bargaining, Labour Relations Act, majoritarianism, minority organisational rights, trade union, workplace

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I INTRODUCTION

Three collective labour law disputes dealing with the rights of minority trade unions have wound their way through the dispute resolution pathways of the Labour Relations Act 66 of 1995 (‘LRA’) to the Constitutional Court (the Court). These cases have one feature in common. They deal with the rights of minority trade unions in the context of the LRA’s collective bargaining framework that is based on the principle of majoritarianism.1

In the first decision, National Union of Metalworkers of SA and Others v Bader Bop (Pty) Ltd and Another,2 the question was whether minority trade unions are entitled to strike to gain statutory organisational rights despite the fact that these rights are only accorded to majority and sufficiently representative trade unions. In this instance the minority trade union succeeded in defending its right to strike and its right to gain organisational rights.

The second decision, Police and Prisons Civil Rights Union v SA Correctional Services Workers Union and Others,3 again dealt with the acquisition of organisational rights. However, in this instance the dispute related to threshold agreements concluded between employers and majority trade unions. The question was whether such agreements should be permitted to exclude minority trade unions from gaining organisational rights through the process of collective bargaining. The Court decided in favour of minority trade unions and held that their right to freedom of association would unjustifiably be limited if threshold agreements were permitted to have such a restricting effect.

In the third matter, Association of Mineworkers and Construction Union v Chamber of Mines,4 a minority trade union contested the extension of a collective agreement by majority trade unions to them.5 Here, the collective agreement contained a no-strike clause. The Court upheld the argument that the majority trade union’s collective agreement bound the minority trade union, thereby justifiably limiting the right of its members to strike. This was a setback for minority trade unions.

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1 This is evident from various sections of the LRA. For example, in terms of s 18.1 only a majority union has the power to enter into a collective agreement with the employer after establishing a ‘threshold of representativeness’ required for one or more of the organisational rights referred to in s 12 (trade union access to the workplace), s 13 (deduction of trade union subscriptions and s 15 (leave for trade union activities). When an arbiter considers a dispute about the representativeness of a trade union for the purpose of awarding organisational rights, he or she must seek to minimise the proliferation of trade union representatives in a workplace and encourage a representative trade union system. Arbitrators must also seek to minimise the financial and administrative burden on an employer in granting organisational rights to more than one registered trade union (s 21(8)(a)).


3 Police & Prisons Civil Rights Union v SA Correctional Services Workers Union & Others [2018] ZACC 24, 2019 (1) SA 73 (CC) (‘SACOSWU’).

4 Association of Mineworkers and Construction Union v Chamber of Mines [2017] ZACC 3, 2017 (3) SA 242 (CC) (‘Chamber of Mines’).

5 In addition, Van Eck (note 1 above) 1496–1510.
The Constitution of the Republic of South Africa, 1996 (‘Constitution’) protects the rights of workers and trade unions to freedom of association, to organise, to strike and to engage in collective bargaining. From the wording of the Constitution it is apparent that these rights are not only accorded to majority or representative trade unions. Some of these rights are accorded to ‘everyone’ and others to ‘every trade union and every employer’s organisation’. To a large extent, the LRA promotes majoritarianism. Due to the fact that the Constitution accords labour rights to ‘everyone’ and to ‘every trade union’, and the fact that the LRA bestows rights on majority trade unions, the courts need to engage in a balancing act between labour rights accorded to members of minority unions and the rights of majority trade unions. With this background in mind, this contribution seeks to consider to what extent the Court has developed coherent and consistent principles regarding the rights of minority trade unions. At a more conceptual level the question will be asked whether the architects of the LRA were successful in developing a coherent framework for collective bargaining; one which adequately acknowledges the participation of minority trade unions. These focus areas are underpinned by the values of the Constitution, as well as international norms as formulated by the International Labour Organisation (‘ILO’).

II CONSTITUTIONAL FRAMEWORK AND INTERNATIONAL NORMS

South Africa’s transition into the democratic era was characterised by the introduction of the Interim Constitution of the Republic of South Africa, 1994 and thereafter the Constitution of 1996. This signalled ‘the birth of a free and democratic South Africa’. The Preamble to the Constitution explains that the Constitution is the supreme law of the country and that it seeks to ‘heal the divisions of the past and establish a society based on democratic values, social justice, and fundamental human rights’.

The Constitution must be interpreted in a manner that accords with the protection of these values. In order to give effect to these values, an essential element of the Constitution is the Bill of Rights, which among others sets out several fundamental labour relations rights. The various labour rights enshrined in the Constitution illustrate that collective bargaining is regarded as the key to a fair industrial relations environment.

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6 Constitution s 18.
7 Ibid s 23(4).
8 Ibid s 23(2)(c).
9 Ibid s 23(5).
10 Notably ibid ss 18 and 23(2)(c).
11 Notably ibid ss 23(4) and (5).
13 The Interim Constitution has been repealed.
14 Association of Professional Teachers & Another v Minister of Education & Others (1995) 16 ILJ 1048 (IC) 1076.
15 Preamble to the Constitution.
16 Chapter 2 of the Constitution.
17 Bader Bop (note 2 above) at para 13.
The Constitution makes provision for a number of rights under two spheres. The one can be categorised under ‘collective labour law’, and by implication ‘collective bargaining’, and the other under ‘freedom of association’.

Section 23(4) to (5) regulates collective labour law by, in the main, providing for:

a) the right of ‘every trade union and every employers’ organisation’ to determine its own administration, programmes and activities; to organise; and to form and join a federation; and

b) the right of ‘every trade union, employers’ organisation and employer’ to engage in collective bargaining.

It is significant to note that these collective bargaining rights are accorded to trade unions and employers’ organisations and not to individual employees. In addition, but contrary to the s 23(4) and (5) rights, s 18 of the Constitution stipulates that ‘[e]veryone has the right to freedom of association’. As will be hypothesised further in this contribution, the drafters of the LRA may not have taken account of the distinction between the right to freedom of association that is accorded to ‘everyone’ and collective bargaining rights that are accorded to trade unions and employers’ organisations. As will become apparent, it is argued that at least some of the organisational rights that have been placed under ch III of the LRA that deals with collective bargaining, should have been placed under ch II that deals with freedom of association.

The Constitution accords significant status to international law principles. Section 232 of the Constitution provides that when ‘interpreting any legislation, every court must prefer any reasonable interpretation … that is consistent with international law’. Added to this, s 39(1) of the Constitution directs that when interpreting the Bill of Rights, courts and tribunals ‘must consider international law’ and ‘may consider foreign law’.

In the arena of labour law, South Africa’s main international law obligations are derived from ratified ILO conventions and related recommendations.18 Whereas ILO conventions only become binding on those member states that have ratified particular conventions, recommendations are not eligible to be approved. Recommendations merely provide support and guidance on the way in which a particular convention may be interpreted and adopted.19 Section 1(b) of the LRA also confirms the importance of norms established by the ILO. It states that it is one of the primary objectives of the LRA to ‘give effect to obligations incurred by the Republic as a member state’ of the ILO.

The ILO has for many years recognised the rights conferred on workers and employers to freedom of association, to organise and to participate in collective bargaining. The ILO’s key conventions of relevance here, which have been ratified by South Africa, are the Convention on Freedom of Association and Protection of the Right to Organise 87 of 1948 (‘Convention 87 of 1948’) and the Convention on the Right to Organise and Collective Bargaining 98 of 1949 (‘Convention 98 of 1949’).

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19 Van Niekerk & Smit (ibid) at 25. In a significant development, when interpreting whether soldiers fall within the ambit of the term ‘worker’ the Court in SA National Defence Union v Minister of Defence & Another [1999] ZACC 7, 1999 (4) SA 469, (1999) 20 IILJ 2265 (CC) at 2278B–D held that ‘when a court is interpreting chap 2 of the Constitution, it must consider international law. In my view, the conventions and recommendations of the International Labour Organisation … are important resources for considering the meaning and scope of “worker” as used in s 23 of the Constitution’. 

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Convention 87 of 1948 does not define ‘freedom of association’. However, art 2 confirms that ‘[w]orkers and employers, without distinction whatsoever, shall have the right to establish and … to join organisations of their own choosing without previous authorisation’. To this, art 3 adds that ‘[w]orkers’ and employers’ organisations shall have the right to draw up their constitutions and rules, to elect their representatives in full freedom … and to formulate their programmes’. It is to be noted that here also, the ILO grants the right to freedom of association to workers, and not to trade union and employers’ organisations. Article 4 of Convention 98 of 1949 provides that policy-makers should adopt appropriate measures ‘to encourage and promote the full development and utilisation of machinery for voluntary negotiation between employers or employers’ organisations and workers’ organisations.’

ILO Conventions are deliberately constructed in a wider sense to provide member states with the required flexibility to import them into their own unique legal systems.\(^\text{20}\) However, the ILO’s supervisory and expert committees have provided valuable guidance pertaining to collective bargaining models and the rights of minority trade unions within such frameworks in its Digest of Decisions and Principles of the Freedom of Association (‘Digest of Decisions’).\(^\text{21}\) As will be seen in the parts that follow, the Court has quite correctly, taken account of not only ILO conventions and recommendations, but also of the decisions of the ILO’s supervisory and investigatory bodies that amplify the conventions.\(^\text{22}\) However, an issue that has not sufficiently come to the fore in the cases discussed below, is the fact that the Constitution accords the right to freedom of association to ‘everyone’ and the fact that collective bargaining rights are not framed in a similar fashion.

The ILO and its supervisory bodies are not prescriptive regarding whether member states should adopt collective labour law models that either promote majoritarianism, or pluralism. Majoritarianism encourages single, but strong, trade unions and encourages the existence of trade unions and employers’ organisations that represent the majority of workers in particular industries. Pluralism leaves room for multiple trade unions and bargaining agents to exist and bargain on their members’ behalf, irrespective of their representivity. The Digest of Decisions emphasises that it ‘is contrary to Convention No. 87 to prevent two enterprise trade unions coexisting.’\(^\text{23}\)

To this, the ILO’s expert committees have said that even though it may be ‘to the advantage of workers to avoid a multiplicity of trade union organizations, unification of the trade union movement imposed through state intervention by legislative means runs counter to the principle embodied in arts 2 and 11 of Convention No. 87.’\(^\text{24}\) In conclusion it is the ILO’s point of departure that ‘a provision authorizing the refusal of an application for registration if another union, already registered, is sufficiently representative of the interests which the union seeking registration proposes to defend, means that, in certain cases, workers may be denied

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\(^\text{21}\) The most significant of these bodies are namely the Committee on Freedom of Association (‘CFA’) and the Fact-Finding and Conciliation Commission on Freedom of Association. The reports of the Committee on Freedom of Association are condensed into the Digest of Decisions and Principles of the Freedom of Association (6th Ed, 2018) (‘Digest of Decisions’) which is a rich source of international law.

\(^\text{22}\) *Bader Bop* (note 2 above) at para 29.

\(^\text{23}\) *Digest of Decision* (note 21 above) at para 480.

\(^\text{24}\) Ibid para 485.
the right to join the organization of their own choosing, contrary to the principles of freedom of association.\textsuperscript{25}

From the above, it is clear that the South African courts are enjoined to prefer an interpretation of the Constitution and labour legislation that acknowledges the rights of minority trade unions even though the LRA has adopted a model that seeks to minimise the proliferation of trade unions in a single workplace.\textsuperscript{26} It remains to be seen whether the structure, that the architects of the LRA followed, leaves room for everyone to enforce their right to freedom of association.

### III ORGANISATIONAL RIGHTS FOR MINORITY UNIONS \textit{(BADER BOP)}

Almost 14 years ago, the Court in \textit{Bader Bop} grappled with the issues of majoritarianism, pluralism and the rights of minority trade unions. The Court had to deal with the question whether trade unions that represent low numbers of workers at the workplace, also referred to as minority trade unions, are entitled to the acquisition of organisational rights.

As a starting point, it is important to explain the structure of the LRA. The Act makes provision for ‘freedom of association and general protections’ under ch II. Sections 4 and 6 state that ‘every employee’ and ‘every employer’ has the right to freedom of association. The regulation of organisational rights has been included under ch III with the title ‘collective bargaining’.

Section 11 of the LRA, under ch III, makes provision for ‘representative trade unions’ to acquire any of the organisational rights.\textsuperscript{27} This would include trade unions that represent the majority of workers at a workplace or those that are sufficiently representative, but excludes minority trade unions. It is submitted that these trade union rights serve as the lifeblood of trade unions and make it possible for them to exist. There are five organisational rights provided for, being, the right to access the workplace (s 12); the right to deduct trade union subscriptions (s 13); the right to elect trade union representatives or shop stewards (s 14);\textsuperscript{28} the right to leave for trade union officials (s 15); and the right to the disclosure of information needed by a trade union to perform its functions effectively (s 16). The rights provided for in ss 12, 13 and 15 are applicable to a sufficiently representative trade union, while a majority trade union is entitled to all five rights. Even though we, the authors of this contribution, do recognise that rights to freedom of association and the right to engage in collective bargaining are interrelated, we question whether the drafters of the legislation were in fact correct in placing organisational rights, which should arguably have been placed under freedom of association, under the heading of collective bargaining in ch III, which importantly, does not accord its rights to everyone. This question is discussed further below.

In this instance the employer, Bader Pop (Pty) Ltd, a manufacturer of leather products, employed approximately 1 000 employees. The General Industrial Workers Union of South

\textsuperscript{25} Ibid para 494.

\textsuperscript{26} LRA s 21(8)(a)(i). See also E Fergus ‘The Disorganisation of Organisational Rights — Recent Case Law and Outstanding Questions’ (2019) 40 \textit{Industrial Law Journal} 685, 687.

\textsuperscript{27} LRA s 11 states that ‘representative trade union’ refers to a registered trade union that is sufficiently representative of the employees employed in a workplace.

\textsuperscript{28} LRA s 14, among others, directs that shop stewards have the right to assist and represent an employee in grievance and disciplinary proceedings; to monitor the employer’s compliance with the workplace-related provisions of the LRA; to report alleged contraventions of the workplace-related provisions of the LRA; and to perform any other functions agreed to with the employer.
Africa (‘GIWUSA’) represented the majority of the workers and it was entitled to, and enjoyed, all of the statutory organisational rights in terms of the LRA. A second trade union, the National Union of Metalworkers of South Africa (‘NUMSA’), only represented 26 per cent of the workers at the employer’s workplace and it neither constituted a majority, nor was it a sufficiently representative trade union. Nonetheless, NUMSA claimed access to the workplace and the right to elect shop stewards. The employer refused to recognise NUMSA’s shop stewards and this lead to NUMSA giving notice of its intention to strike to enforce its demands.

Ultimately, the Court in Bader Bop had to grapple with the fundamental rights of minority trade unions that we argue are closely related to freedom of association, and the right to strike that falls squarely under collective bargaining.

In its application for an interdict against the strike, the employer contended that NUMSA could not strike as it was not entitled to claim the organisational rights in question in terms of the LRA. It further argued that the only available option to smaller trade unions would be to rely on the tailor-made conciliation and arbitration process in terms of s 21 of the LRA to gain these rights.

In relation to workers’ right to strike, the Court noted that s 65(1)(c) of the LRA provides that:

(1) No person may take part in a strike or a lock-out or in any conduct in contemplation or in furtherance of a strike or a lock-out if […] (c) the issue in dispute is one that a party has the right to refer to arbitration or to the Labour Court in terms of this Act;

It is trite that in general terms, workers’ right to strike are justifiably limited in instances such as s 65(1)(c) where their dispute can be resolved through arbitration or adjudication. However, s 65(2) creates an exception to this rule. It provides that:

(2) (a) Despite section 65(1)(c), a person may take part in a strike or lock-out or in any conduct in contemplation or in furtherance of a strike or lock-out if the issue in dispute is about any matter dealt with in sections 12 to 15.

Accordingly, a trade union has the right to either refer a dispute about the acquisition of organisational rights to conciliation and arbitration in terms of s 21 of the LRA, or it may opt for strike action. In this instance NUMSA opted to strike.

NUMSA argued that the limitation on minority trade unions which precludes them from gaining the rights to access and to appoint representatives was unconstitutional and should be struck down on grounds of limiting their rights to freedom of association and to strike. In the alternative, it argued, the Court should interpret s 65(1)(c) and 65(2) of the LRA in such a way that these fundamental rights would not be infringed.

As a starting point, Bader Bop highlighted the fact that the first purpose of the LRA is to give effect to constitutional rights. Secondly, the LRA should give legislative effect to South Africa’s obligations arising from the ratification of ILO conventions. Thus, the Court held, international obligations are of great importance to the interpretation of the LRA. The Court emphasised that a significant principle of freedom of association is enshrined in art 2 of ILO Convention 87 of 1948 that states that workers ‘without distinction whatsoever’ shall have the right to ‘establish and join organisations of their own choosing’. As to its interpretation, the Court held that:

29 LRA s 21 describes the process that must be followed by a registered trade union which seeks to exercise one or more of the organisational rights provided for in the LRA.
30 Bader Bop (note 2 above) at para 12.
31 Ibid at para 26.
Although both [ILO] committees have accepted that this does not mean that trade union pluralism is mandatory, they have held that a majoritarian system will not be incompatible with freedom of association, as long as minority unions are allowed to exist, to organise members, to represent members in relation to individual grievances and to seek to challenge majority unions from time to time.\(^{32}\)

As we point out in the rest of the discussion, some of these rights, such as the right to organise members and to represent members in relation to individual grievances, may, incorrectly have been placed under ch III, rather than ch II of the LRA, thus making them available only as members of representative trade unions and not as aspects of the right to freedom of association — a right available to every employee under ch II.

Nonetheless, the Court held that the principle of freedom of association ‘is ordinarily interpreted to afford unions the right to recruit members and to represent those members at least in individual workplace grievances.’ This principle, the Court continued, ‘is closely related to the principle of freedom of association entrenched in section 18 of our Constitution.’ Rather than giving serious thought to striking relevant provisions from the LRA on grounds of unconstitutionality, the Court then grappled with the question whether the LRA is capable of being interpreted in a manner that does not infringe the Constitution. If the LRA is capable of such a broader interpretation, the Court held that it would prefer such an interpretation.\(^{33}\)

The Constitutional Court took note of the fact that the Labour Appeal Court (LAC) had relied heavily on the provisions of s 21 of the LRA before reaching its decision.\(^{34}\) Section 21(8) provides that in determining whether a union is representative for the purposes of organisational rights, the commissioner must seek ‘to minimise the proliferation of trade unions’ in a workplace and ‘encourage a system of a representative union[ ].’ These principles are of specific import where the commissioner is concerned with a disagreement about whether a trade union is ‘sufficiently representative’ for the purposes of ss 12, 13 and 15 of the LRA.

In addition, the Constitutional Court considered the content of ss 18 and 20 of the LRA and the interpretation given to it by the LAC. Section 18 permits employers and unions to conclude a collective agreement to establish the specific threshold necessary to exercise the rights in ss 12, 13 and 15, defined in the LRA as ‘sufficiently representative’. This, the Court held, the LAC had incorrectly interpreted to mean that minority unions could not use strike action to obtain organisational rights in conflict with such an agreement.\(^{35}\) Should such an interpretation be accepted, the Court held, it would fail to take into account the principles contained in the ILO Conventions and it would not avoid the limitation of constitutional rights. The Court considered whether the LRA is capable of an interpretation that does not unjustifiably limit constitutional rights,\(^{36}\) which it answered in the affirmative. The Court held that ‘the Act expressly confers enforceable organisational rights on certain unions — unions that are either sufficiently representative (sections 12, 13 and 15) or majority unions

\(^{32}\) Ibid at para 31.

\(^{33}\) Ibid at paras 35, 36.


\(^{35}\) Bader Bop (note 2 above) at para 38.

\(^{36}\) Ibid at para 39.
(sections 14 and 16). These are enforceable rights and the mechanism for their enforcement … is conciliation followed by arbitration.\textsuperscript{37}

However, the Court alluded to the fact that in this instance the LRA gives unions and employers a choice between arbitration and industrial action should conciliation fail. The Court continued that:

There is nothing in Part A of Chapter III, however, which expressly states that unions which admit that they do not meet the requisite threshold membership levels are prevented from using the ordinary processes of collective bargaining and industrial action to persuade employers to grant them organisational facilities such as access to the workplace, stop-order facilities and recognition of shop stewards. These are matters which are clearly of ‘mutual interest’ to employers and unions and as such matters capable of forming the subject matter of collective agreements and capable of … strike action.\textsuperscript{38}

To this, the Court added, s 20 of the LRA provides that nothing in this part of the LRA ‘precludes the conclusion of a collective agreement that regulates organisational rights’.\textsuperscript{39} Whereas the LAC was of the view that this provision was meant to clarify that only representative unions within the definition of s 11 and employers, may conclude such agreements, the (Constitutional) Court concluded that such a reading of s 20 ‘is a narrow one’ in ‘an Act committed to freedom of association’. In the Court’s view ‘a better reading is to see section 20 as an express confirmation of the internationally recognised rights of minority unions to seek to gain access to the workplace, the recognition of their shop-stewards as well as other organisational facilities through the techniques of collective bargaining’.\textsuperscript{40}

Nonetheless, the Court, did recognise that a right to engage in collective bargaining such as this could only have a limited impact on collective bargaining practice. The more members any union has, the stronger the chance that they will be able to engage in a successful strike. The Court opined that this judgment would probably have its greatest impact in relation to the recognition of shop stewards. The Court underlined that this judgment did not have the effect that minority unions would be entitled to have their shop stewards recognised, or that employers would be obliged to recognise shop stewards for the content and purposes of s 14. The exact rights and duties for which recognition is approved, if agreed upon at all, would be a matter for the process of collective bargaining to resolve.

In reflecting upon \textit{Bader Bop}, the following prominent points stand out. The Court’s ultimate decision was inspirational and appropriate in so far as it not only recognised, but also embraced South Africa’s obligation to adhere to its international law obligations imposed by, among others, the ILO and the decisions of its expert committees. The Court had no doubt about protecting minority trade unions’ right to freedom of association, despite the fact that the LRA establishes a majoritarian system which clearly seeks to limit the proliferation of trade unions. However, the Court could conceivably have gone further by placing emphasis on the fact at least some of the organisational rights that have been included under ch III clash with the principle that these rights are only accorded to representative trade unions and not to ‘everyone’.

Despite the positive aspect that the Court was swayed by ILO principles, the question has quite correctly been posed whether the Court went far enough in protecting the right to

\textsuperscript{37} Ibid at para 40.
\textsuperscript{38} Ibid.
\textsuperscript{39} Ibid at para 41.
\textsuperscript{40} Ibid.
freedom of association. Chicktay, for example, argues that the Court should have grabbed the bull by the proverbial horns and should have declared the limitations imposed on minority trade unions by means of the s 21 procedure to be unconstitutional.\(^4\) Chicktay’s argument continues that the emphasis that the LRA places on the ‘minimisation’ of trade unions ostensibly clashes with ILO and constitutional provisions. Chicktay did not, however, pose the question, as is done in this contribution, of whether a number of the organisational rights, such as the right to appoint shop stewards, and the right to be represented by trade representatives of choice during individual grievance and disciplinary hearings, should rather be placed under ch II of the LRA, which deals with freedom of association for ‘every employee’ and ‘every employer’. However, the Court in \textit{Bader Bop} was not willing to be as bold as it could have been. Rather than this, it sought a more lenient, almost artificial mid-way, of interpreting the LRA to leave room for the existence of minority trade unions. The Court’s method of doing this was to find that despite the fact that the LRA clearly encourages the formation of single, strong trade unions, there was nothing explicitly included in the LRA which prohibited minority trade unions from gaining trade union rights through the mechanisms of collective bargaining. This, it is argued, policy-makers could resolve by reconsidering where the organisational rights that are closely linked to freedom of association particularly should be placed in the LRA. It is submitted that organisational rights would fit better under the chapter that accords rights to everyone, rather than the chapter that deals with collective bargaining and accords rights to representative trade unions.

V THRESHOLD AGREEMENTS PERTAINING TO ORGANISATIONAL RIGHTS (SACOSWU)

\textit{SACOSWU}, a case that was similar to \textit{Bader Bop}, dealt with the right of minority unions to be accorded organisational rights. However, the case did not centre around whether or not a minority union has the right to strike to acquire such rights, but rather the impact of a threshold agreement on a minority union that seeks to be afforded organisational rights.

The issue in dispute before the Court in \textit{SACOSWU} was whether an employer and minority trade union may engage in collective bargaining over the awarding of organisational rights when there is already a collective agreement in place with a majority union in terms of s 18 of the LRA. A section-18 agreement prescribes the threshold of representativeness that trade unions are required to meet in order to acquire certain organisational rights.\(^4\) Section 18(1) states:

\begin{itemize}
  \item[(1)] An employer and a registered trade union whose members are a majority of the employees employed by that employer in a workplace, or the parties to a bargaining council, may conclude a collective agreement establishing a threshold of representativeness required in respect of one or more of the organisational rights referred to in sections 12, 13 and 15.
\end{itemize}

In this instance the employer was the Department of Correctional Services (‘DCS’), the majority union was the Police and Prisons Civil Rights Union (‘POPCRU’) and the minority union was the South African Correctional Services Workers’ Union (‘SACOSWU’). It was common cause that the DCS entered into a threshold agreement with POPCRU in 2001, which provided that a trade union must have a minimum of 9 000 members in order to be

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\(^{42}\) \textit{SACOSWU} (note 3 above) at paras 1 and 64.
admitted to the Departmental Bargaining Chamber\textsuperscript{43} and to consequently be awarded the organisational rights provided for in ss 12, 13 and 15 of the LRA.\textsuperscript{44} As discussed earlier, these organisational rights relate to trade union access to the workplace, the deduction of trade union subscriptions and the granting of leave to office bearers for trade union activities.\textsuperscript{45}

When SACOSWU was registered in 2009, and despite not meeting the prescribed threshold of 9 000 members, it approached the DCS for the awarding of certain organisational rights.\textsuperscript{46} The DCS subsequently granted them the right to represent their members at disciplinary and grievance proceedings, as well as the deduction of trade union subscriptions.\textsuperscript{47}

POPCRU was aggrieved by the decision of the DCS and declared a dispute.\textsuperscript{48} It contended that the 2001 threshold agreement that the DCS concluded with it barred the DCS from bargaining with SACOSWU over the granting of organisational rights.\textsuperscript{49} SACOSWU counter argued that the 2001 threshold agreement merely set out the minimum membership that a trade union must have in order to automatically acquire the organisational rights provided for in ss 12, 13 and 15 of the LRA.\textsuperscript{50} However, it reasoned that the existence of the threshold agreement did not prevent a minority union that did not satisfy the threshold requirement from bargaining with the employer to obtain organisational rights. It relied on s 20 of the LRA to support its argument.\textsuperscript{51} Section 20 states that 'nothing in this Part precludes the conclusion of a collective agreement that regulates organisational rights'.\textsuperscript{52}

The case essentially turned on the interpretation of ss 18 and 20 of the LRA.\textsuperscript{53} The majority judgment found that the existence of a s 18 agreement between the employer and a majority union does not preclude the conclusion of a collective agreement between the same employer and a minority union.\textsuperscript{54} Therefore, the 2001 threshold agreement concluded between the DCS and POPCRU did not prevent SACOSWU from bargaining with the DCS.

The Court based its decision on the Constitution, notably the Bill of Rights, which provides for the right to freedom of association, the right to form or join a trade union and the right of a trade union to engage in collective bargaining.\textsuperscript{55} Considering the fact that constitutional rights were at play, the Court highlighted the application of s 39(2) of the Constitution which requires that the objects of the Bill of Rights be promoted when interpreting legislation.\textsuperscript{56} The Court emphasised the importance of interpreting the LRA in a manner that is in compliance

\textsuperscript{43} Ibid at paras 14–18.
\textsuperscript{44} Emphasis added.
\textsuperscript{45} LRA ss 12, 13, 15.
\textsuperscript{46} SACOSWU (note 3 above) at para 20.
\textsuperscript{47} Ibid at para 21. Although the parties did not dispute that the right given to SACOSWU to represent its members at disciplinary and grievance proceedings fell within the ambit of a section-12 right (para 51), the Court considered the correctness of this due to the fact that these rights are expressly provided for in s 14 of the LRA (para 108). While this does not detract from the interpretation to be accorded to ss 18 and 20, s 14 rights do not fall within the ambit of a collective agreement concluded in terms of s 18. However, it does not prevent a minority union from bargaining with the employer to acquire such rights (para 110).
\textsuperscript{48} Ibid at para 23.
\textsuperscript{49} Ibid at para 4.
\textsuperscript{50} Ibid at para 5.
\textsuperscript{51} Ibid at paras 5 and 9.
\textsuperscript{52} LRA s 20.
\textsuperscript{53} SACOSWU (note 3 above) at para 65.
\textsuperscript{54} Ibid at para 101.
\textsuperscript{55} Ibid at paras 71–72.
\textsuperscript{56} Ibid at para 84.
with the Constitution.\(^\text{57}\) Therefore s 18 had to be interpreted in a manner that advanced the applicable constitutional rights. The Court concluded that:

Any statutory provision that prevents a trade union from bargaining on behalf of its members or forbidding it from representing them in disciplinary and grievance proceedings would limit rights in the Bill of Rights. Forcing workers who belong to one trade union to be represented by a rival union at disciplinary hearings seriously undermines their right to freedom of association described earlier.\(^\text{58}\)

Essentially, the Court advocated for a purposive interpretation of s 18, which avoided a meaning that limited the applicable constitutional rights.\(^\text{59}\) The Court further supported the purposive interpretation given to s 20 in the earlier judgment of \textit{Bader Bop}.\(^\text{60}\) It is submitted, though, that the Court may have missed a golden opportunity to highlight the fact that the right to freedom of association relates to everyone and that the right to engage in collective bargaining in terms of s 23(5) applies to trade unions and employers’ organisations. One of the rights alluded to by the Court, namely the right to be represented during individual hearings by a trade union of choice, in our mind would fit better under ch II of the LRA to be dealt with as a right under freedom of association.

The Court acknowledged that subsequent to this dispute being declared there had been amendments to the LRA,\(^\text{61}\) which impacted on the right of minority unions to acquire organisational rights.\(^\text{62}\) This impact arose from an amendment, s 21(8C), which allows a minority union that does not meet the threshold of representativeness set out in a collective agreement concluded in terms of s 18 to acquire ss 12, 13 and 15 organisational rights through arbitration. These organisational rights can be awarded to a minority union, provided that certain requirements are complied with.\(^\text{63}\) However, the Court found that despite these amendments, the meaning to be attached to ss 18 and 20 are still relevant\(^\text{64}\) as these amendments do not take away the right of a minority union to obtain organisational rights through collective bargaining. Instead, the section provides a further avenue through which minority unions can pursue the acquisition of organisational rights.\(^\text{65}\) The Court held:

When properly construed Chapter III of the LRA reveals that a minority union may access organisational rights in sections 12, 13 and 15 in a number of ways. \textit{First}, it may acquire those rights if it meets the threshold set in the collective agreement between the majority union and the employer. In that event, a minority union does not have to bargain before exercising the rights in question. \textit{Second}, such union may bargain and conclude a collective agreement with an employer, in terms of which it would be permitted to exercise the relevant rights. \textit{Third}, a minority union may refer the question whether it should exercise those rights to arbitration in terms of section 57 LRA s 3(b).

58 \textit{SACOSWU} (note 3 above) at para 90. See also \textit{Van Eck & Esitang} (note 12 above) 763, 768.

59 \textit{SACOSWU} (note 3 above) at para 92.

60 Ibid para 97.

61 Ibid at paras 63 and 65.

62 The explanatory memorandum to the LRA (2014).

63 These requirements are set out in the LRA s 21(8)(C)a–b. The first requirement is that all parties to the collective agreement must have been given an opportunity to participate in the arbitration proceedings. The second requirement is that the trade union or trade unions acting jointly must represent a significant interest or a substantial number of employees in the workplace.

64 \textit{SACOSWU} (note 3 above) at para 65 and 67. See also \textit{Fergus} (note 26 above) 688, 695.

65 \textit{SACOSWU} (note 3 above) at para 68.
21(8C) of the LRA. If the union meets the conditions stipulated in that section, the arbitrator may grant it organisational rights in the relevant provisions.\(^\text{66}\)

It is noteworthy that the above pronouncements made by the majority were contrary to the view expressed by the minority.\(^\text{67}\) Cachalia AJ held that the dispute was moot due to the fact that the 2001 threshold agreement ceased to exist in 2013.\(^\text{68}\) It followed, according to the minority, that it was not in the interests of justice to entertain the matter as disputes regarding threshold agreements concluded in terms of s 18 would in future have to be dealt with in terms of the new statutory regime, which includes s 21(8C).\(^\text{69}\)

It is clear that SACOSWU’s majority judgment relied on constitutional imperatives and the need to advance the rights protected by the Bill of Rights. The Court can be commended for adopting a purposive interpretation of provisions of the LRA, which ties in with the approach followed in *Bader Bop*.\(^\text{70}\)

However, there is undoubtedly one area of difficulty in the majority judgment’s interpretation of the LRA. This is the anomaly created by, on the one hand, giving majority unions the power to conclude threshold agreements with an employer for the granting of organisational rights, while on the other, giving a minority union the right to conclude a separate collective agreement with the same employer that circumvents the purpose of the threshold agreement. Zondo DCJ, who concurred with the majority but for different reasons,\(^\text{71}\) took issue with this. He stated as follows:

> A conclusion that says or implies that an employer may be party to both a section 18(1) collective agreement fixing a certain threshold of representativeness in the workplace that unions must meet if they want certain statutory organisational rights and at the same time also be party to a collective agreement granting those statutory organisational rights to a trade union which does not meet that threshold will spell the end of section 18(1) collective agreements. This is because such a conclusion will mean that a section 18(1) collective agreement has no efficacy and is not helpful to anybody, be it the employer or the majority union. The effect of such a conclusion will be that an employer who is party to a section 18(1) collective agreement may breach such an agreement with impunity.\(^\text{72}\)

We agree with Zondo J’s contention. Section 18(1) of the LRA is in fact irrelevant if it can be overridden by a section-20 agreement. Against the background of the anomaly created by the majority’s interpretation of s 20, it is admittedly difficult to understand the purpose of s 20, other than in the way postulated by the majority.\(^\text{73}\) Even though s 21(8C) sought to improve

\(^\text{66}\) Ibid at para 102. Emphasis added.
\(^\text{67}\) The minority judgment was delivered by Cachalia AJ at paras 1–61.
\(^\text{68}\) SACOSWU (note 3 above) at paras 25, 33, 37, 43 and 44.
\(^\text{69}\) Ibid at paras 47–48.
\(^\text{70}\) In addition, see *National Education Health & Allied Workers Union v University of Cape Town* [2002] ZACC 27, 2003 (3) SA 1 (CC), (2003) 24 ILJ 95 (CC) where a purposive interpretation of LRA provisions was followed.
\(^\text{71}\) SACOSWU (note 3 above) at para 113.
\(^\text{72}\) Ibid at para 141.
\(^\text{73}\) This was also the interpretation of s 20 adopted by the Court in *Bader Bop* (note 2 above) para 41. The Court rejected the interpretation of s 20 afforded by Zondo JP and Du Plessis AJA in the LAC. These judges were of the view that s 20 did not provide for minority unions to conclude collective agreements with employers over the granting of organisational rights, but was rather a ‘clarificatory provision’ that agreements between representative unions and employers could regulate rights. The Constitutional Court rejected this interpretation as being narrow and did not accord with the ordinary language of the provision.
the rights of a minority union that is disadvantaged by s 18 threshold agreements,74 s 20 was not repealed following the introduction of s 21(8C), nor was it amended to make the provision applicable exclusively to representative trade unions.

Though not regarded as a justifiable interpretation, it is important to consider Zondo DCJ’s connotation of s 20. While stating that a minority union is not barred from negotiating with the employer to obtain organisational rights despite the existence of a threshold agreement, the Judge sought to distinguish between statutory organisational rights regulated by a threshold agreement and contractual organisational rights, which are the type of rights that can be negotiated with the employer.75 In Zondo DCJ’s view, s 20 caters for contractual organisational rights. He states as follows, ‘so, section 20 contemplates organisational rights in collective agreements whereas the organisational rights dealt with in Part A of Chapter III of the LRA are not rights in a collective agreement but in a statute or conferred by statute.’76

Applying this interpretation to the case at hand, he stated that if the rights granted by the DCS to SACOSWU were statutory organisational rights then it was not permitted, because the s 18 threshold agreement precluded this.77 However, in his view the organisational rights granted by the DCS to SACOSWU were not statutory organisational rights but rather contractual organisational rights.78

In support of this contention, Zondo DCJ referred to the fact that contractual organisational rights were permitted under the old dispensation and that nothing in the current LRA suggests that these rights are no longer available or have been abolished.79 It seems that Zondo DCJ’s reference to contractual organisational rights are trade union rights in general, which could either be the same, overlap with or go beyond those granted in ss 12, 13, 14, 15 and 16 of the LRA.80 The only difference lies in the methods of attainment: the one being through the mechanisms of s 21 of the LRA, and the other more difficult one for minority trade unions, through collective bargaining. Although we agree with the end result of both the majority’s and Zondo’s decisions, the granting of organisational rights with substantively the same content, but under two names, seems to be an artificial delineation.81

While SACOSWU adopted an approach that complies with international and constitutional law in relation to the right to freedom of association, it does create incongruity amongst LRA

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74 Memorandum of Objects Labour Relations Amendment Bill, 2012 at 2 and 3 state that the section is amended to broaden the discretion of a commissioner toward organisational rights in certain circumstances. The commissioner may overlook a threshold agreement if applying it would unfairly affect another trade union. A commissioner applying the new provision must draw an appropriate balance between the rights of the trade union wishing to exercise organisational rights and the rights of the majority trade union. See also Esitang & Van Eck (note 12 above) 768–769.
75 SACOSWU (note 3 above) at paras 134, 138 and 139.
76 SACOSWU (note 3 above) at para 134.
77 Ibid at para 140.
78 Ibid at para 142.
79 Ibid at paras 130–133.
80 Ibid at para 145 Zondo DCJ drew an analogy between contractual organisational rights and the notice periods provided in the Basic Conditions of Employment 75 of 1997. He stated that while the BCEA provides for at least two weeks written notice, this notice period can be extended in a contract of employment to one month. In other words, the organisational rights provided for in the LRA are minimum rights and these rights can be extended through a contractual agreement.
81 Fergus (note 26 above) 698–700 discusses the problems that can arise through a distinction between statutory and contractual rights.
provisions. Therefore, we argue that s 18 should be removed. As suggested by Zondo, what is the use of keeping s 18 in the LRA if agreements concluded in terms of it can be disregarded with impunity when agreements are concluded in terms of s 20? Added to this, and as argued towards the end of this contribution, it is suggested that policy-makers should review the whole structure relating to the granting of organisational rights within the LRA. Some of these rights, like access to the workplace, the appointment of shop stewards and the right to be represented by a trade union of choice, fit better under the part of the LRA that deals with freedom of association than the part that deals with collective bargaining.

IV THE EXTENSION OF COLLECTIVE AGREEMENTS (CHAMBER OF MINES)

Whereas *Bader Bop* and *SACOSWU* dealt with the rights of minority trade unions within the domains of freedom of association and the realisation of organisational rights of minority trade unions, *Chamber of Mines* fell under the spheres of collective bargaining, the right to strike and the extension of collective agreements.

In this instance the Chamber of Mines, an employers’ organisation, concluded a collective agreement pertaining to wage increases between three employers on the one hand, and three trade unions bargaining in an alliance, on the other. Each employer operated more than one mine in different parts of South Africa. The three trade unions represented the majority of mine workers counted across all the mines of the three employers. Even though not part of the coalition of trade unions in this part of the mining sector, the up-and-coming Association of Mineworkers and Construction Union (‘AMCU’), had majority membership at some of the three employers’ mines. However, it was common cause that AMCU did not have majority membership at all the mines added together. The collective agreement concluded with the coalition of trade unions contained a ‘no-strike clause’ which spanned two years.

AMCU did not agree with the wage increase contained in the collective agreement and it gave notice to strike. If AMCU was to succeed with its industrial action, their gains would be obvious amidst the trade union rivalry. They would attract members if they succeeded in negotiating a higher increase than the one contained in the collective agreement. The Labour Court (LC) granted an interdict against AMCU’s planned strike.82 This decision was taken on appeal and was ultimately considered by the Constitutional Court. Central to the dispute was the question of whether AMCU’s right to strike was legitimately restricted by the collective agreement that had been concluded with the majority trade unions and to which AMCU had not been a party.

The first provision of the LRA that is of importance relates to the limitations that are placed on the right to strike. Section 65 states that:

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82 The interim order was published in *Chamber of Mines of SA acting in its own name & on behalf of Harmony Gold Mining Company Ltd & Others v Association of Mineworkers and Construction Union & Others* (2014) 35 ILJ 1243 (LC) and was confirmed on the return date in *Chamber of Mines of SA acting in its own name & on behalf of Harmony Gold Mining Company Ltd & Others v Association of Mineworkers & Construction Union & Others* [2014] ZALCJHB 223, 2014 (11) BCLR 1369 (LC), (2014) 35 ILJ 3111 (LC) (‘Chamber of Mines LC’). This decision was taken on appeal and reported in *Association of Mineworkers & Construction Union & Others v Chamber of Mines of SA acting in its own name and on behalf of Harmony Gold Mining Co (Pty) Ltd & Others* [2017] ZACC 3, 2017 (3) SA 242 (CC), (2016) 37 ILJ 1333 (LAC) (‘Chamber of Mines LAC’).
(1) No person may take part in a strike or a lock-out or in any conduct in contemplation or furtherance of a strike or a lock-out if – (a) that person is bound by a collective agreement that prohibits a strike or lock-out in respect of an issue in dispute.

As a consequence, if AMCU had been bound by the collective agreement, it would have been precluded from initiating the strike. The second provision central to the Court’s finding is s 23(1) of the LRA. It deals with the binding effect of collective agreements on parties and non-parties. However, it does not contain an expansion mechanism coupled with safeguards, as is the case with the extension of bargaining council agreements. As amongst others, there must be an effective procedure, and fair criteria, for non-parties to apply for exemptions through an independent body. As could be expected, collective agreements bind the signatories to the collective agreement as well as their members. However, s 23(1)(d)(iii) goes further and provides that collective agreements also bind employees who are not members of the signatory unions if ‘(i) the employees are identified in the agreement;’ and ‘(iii) that trade union or trade unions … [that are party to the collective agreement] have as their members the majority of employees employed by the employer in the workplace’.85

What is of significance here, is that the requirement for extension ties the majoritarian principle to the notion ‘workplace’ and not to the sector.86

In respect of the private sector, s 213 of the LRA defines a workplace as ‘the place or places where the employees of an employer work. If an employer carries on or conducts two or more operations that are independent of one another by reason of their size, function or organisation, the place or places where employees work in connection with each independent operation constitute the workplace for that operation.’87

In Chamber of Mines, the employers relied on the fact that the grouping of three trade unions added up to a majority at the workplace and the minority trade union AMCU was bound by the agreement that contained a no-strike clause. AMCU raised the point that s 23(1) (d) is constitutionally invalid in so far as it infringes every worker’s right to strike.88

Secondly, it contended that the term ‘workplace’ should be accorded a broad interpretation which means that each of the mines where the workers render services is a separate workplace rather than all of an employer’s operations taken together.89

The third argument was that the agreement was in effect extended as if it was a bargaining council agreement to this part of the mining sector. This occurred even though the same safeguards that are applicable to bargaining council agreements do not apply to the extension of this type of agreement.90 The argument was that the Chamber of Mines had in effect circumvented s 32 by extending the agreement to non-parties by means of s 23.

The Court rejected AMCU’s first argument and held that even though s 23 has the effect of limiting the fundamental right to strike, such limitation is justifiable. The Court held that:

83 LRA s 32(1) requires that a bargaining council make a written application to the Minister of Labour for the extension of a collective agreement to non-parties if the majority union/s and majority employer’s organisation/s vote in favour of such extension.
84 LRA s 32(3)(e)–(f).
85 Emphasis added.
86 Emphasis added.
87 Van Eck (note 1 above) 1496.
88 Chamber of Mines (note 4 above) at para 15.
89 Ibid at para 11.
90 Ibid at paras 12–14.
AMCU is right that the codification of majoritarianism in section 23(1)(d) limits the right to strike. The key question is whether the principle provides sufficient justification for that limitation. ... In short, the best justification for the limitation the principle imposes is that majoritarianism, in this context, benefits orderly collective bargaining.\(^91\)

The Court accepted that it is internationally recognised that ‘majoritarianism is functional to enhanced collective bargaining’.\(^92\) A noteworthy observation is that the Court did not explore further whether South Africa has adopted an exclusively majoritarian approach, which has the effect that the right to strike is a collective right which belongs to unions, or whether it remains an individual right which is exercised collectively. The Constitution designated it an individual right and stated that ‘every worker’ has the right to strike.\(^93\)

Rather than relying on the importance of the right to freedom of association as a point of departure, as was done in \textit{Bader Bop}, the Court relied on the advantages of majoritarianism to support its decision that s 23(1)(d)’s limitation on the right to strike was justifiable.\(^94\) The Court accepted the approach of the LAC in \textit{Kem-Lin Fashions CC v Brunton ‘Kem-Lin Fashions’}\(^95\) where it held that the legislature had made the policy choice in the LRA ‘that the will of the majority should prevail over that of the minority.’ This, \textit{Kem-Lin Fashions} said, is conducive to ‘orderly collective bargaining as well as for the democratisation of the workplace.’ The Court also pointed out that ‘a situation where the minority dictates to the majority is … untenable’ and that the ‘proliferation of trade unions in one workplace or in a sector should be discouraged.’

Turning to the interpretation of the definition of ‘workplace’, the Court held that firstly, the definition’s ‘focus [is] on employees as a collectivity’ and, secondly, there is a ‘relative immateriality of location’ where the employees work.\(^96\) It held that the definition that the LRA accords to ‘workplace’ is something different from its ordinary meaning, namely the actual place where an employee works. The Court held that the phrase, ‘the place or places where the employees of an employer work’, refers to all the places where the employer’s employees collectively work.\(^97\) The second part of the definition makes provision for an exception, namely that a number of operations may be different workplaces only if each operation is independent.\(^98\) The Court accepted the findings of both the LC and the LAC that each of the individual mining houses shared the same financial, information technology and human resources systems; and consequently operated in an integral fashion thereby constituting a single workplace.\(^99\) The Court concluded that ‘no reason in constitutional principle, legal analysis or factual assessment provides a reason for this court to overturn those findings.’\(^100\) Essentially, the stance of the Court is that there is no basis to favour minority trade unions in the interpretation of a workplace.

\(^{91}\) Ibid at para 50.
\(^{92}\) Ibid at para 56.
\(^{93}\) Constitution s 23(2)(c).
\(^{94}\) \textit{Chamber of Mines} (note 4 above) at paras 43, 44 and 50. See also IM Rautenbach ‘The Constitutionality of Statutory Authorisation to Conclude Collective Agreements that Bind Non-Parties to Strike’ (2017) \textit{Tydskrif vir die Afrikaanse Reg} 857, 861.
\(^{96}\) \textit{Chamber of Mines} (note 4 above) para 24.
\(^{97}\) Ibid para 27.
\(^{98}\) Ibid.
\(^{99}\) Ibid at para 31.
\(^{100}\) Ibid at para 37.
In relation to AMCU’s final argument, the Court also rejected the trade union’s contention that the extension of the agreement should not have occurred under s 23(1)(d) but under s 32 with its sectoral nature and safeguards. The Court accepted the ‘constitutional warrant for majoritarianism in the service of collective bargaining’.

However, it pointed out that s 23(1)(d) is not without safeguards. It explained that AMCU’s argument that s 23(1)(d) ‘does not allow for judicial checks on extensions of collective agreements’, as opposed to s 32, ‘is wrong’. This is because an agreement concluded under s 23(1)(d) is subject to judicial scrutiny, by way of a review under the principle of legality.

The Court concluded that the interdict against AMCU had been valid under these circumstances and that the order’s restriction on the right to strike was reasonable and justifiable within the collective bargaining framework established by the LRA.

There is an apparent divergence of approach between Chamber of Mines and the two previous cases. While the preceding cases heeded the principle of majoritarianism, the right to freedom of association was of primary importance. This led to a purposive interpretation of LRA provisions, to such an extent that in SACOSWU s 18 of the LRA, which promotes majoritarianism, was defeated through the majority judgment’s interpretation of s 20. Conversely, in Chamber of Mines protecting the principle of majoritarianism was of primary importance in interpreting s 23(1)(d) of the LRA and the definition of workplace. The Court in Chamber of Mines, as in SACOSWU, considered the principles laid down in Bader Bop. The Court found that although AMCU and the employees that it represented lost their right to strike due to the effect of the agreement, AMCU had been provided with and did not lose its organisational and collective bargaining rights. The Court went on to say that ‘this means that the LRA, though premised on majoritarianism, does not make it an implement of oppression’. This suggests that while the Court acknowledged the importance of giving minority unions a voice by allowing them to co-exist, to organise, to represent members and to challenge majority unions, the view was that this could be sufficiently achieved through the right to freedom of association. However, at a collective bargaining level majoritarianism must be championed. The divergence in approach can thus be attributed to the fact that Bader Bop and SACOSWU dealt with the right of minority trade unions to freedom of association, while Chamber of Mines focused on the rights of minority trade unions during collective bargaining.

While the right to freedom of association and collective bargaining are admittedly related, there may be justification for the Chamber of Mines’ advocation of the principle of majoritarianism in considering the right to engage in collective bargaining. It is a credible argument that once sufficient room has been left for trade unions to establish and organise themselves, it would create an untenable situation if it was to be required of employers to negotiate with each and every trade union irrespective of its representivity. However, it is submitted that the LRA ought to be reorganised. The aspects that relate to freedom of association, like the right to be represented by a trade union of choice, should ideally be placed under ch II of the LRA that deals with the right of every employee and every employer to freedom of association.

101 Ibid at para 57.
102 Ibid at para 73.
103 Ibid at para 84.
104 Ibid at para 52.
105 Ibid at para 54.
106 Ibid at para 55.
VI ARE THE JUDGEMENTS ALIGNED?

There can be no doubt that the decision of SACOSWU accords with the approach followed in Bader Bop. However, it is notable that s 21(8C) was not in existence at the time that Bader Bop was decided. This position has changed, as s 21(8C) caters specifically for minority unions. Therefore, the question is whether this would alter the right of a minority union to strike. The answer is probably not, as s 65(2)(a) remains intact. This means that a minority union has a choice between following the s 21(8C) procedure or striking in respect of the acquisition of organisational rights.

Although Bader Bop and SACOSWU did not deal with exactly the same set of facts, what is evident from a consolidation of these two judgments is the following:

a) A minority union can bargain with an employer to acquire organisational rights. This is irrespective of the existence of a s 18 threshold agreement and is an avenue that they can follow despite the existence of s 21(8C).

b) If the collective bargaining process is successful, a minority union can enter into a collective agreement.

c) If the collective bargaining process is unsuccessful, the minority union has the right to embark on a strike to try to acquire the organisational rights that it seeks.

It is significant to note that these Court decisions were reached by applying the provisions that exist in the LRA. The Court did not deposite the principle of majoritarianism. Instead, through a purposive interpretation of LRA provisions, the Court was able to reconcile this principle with freedom of association. The Court will not perform the role of the social partners and policy-makers to redraft the LRA by making a new policy choice of pluralism instead of majoritarianism. Such policy choices need to be made by organised business, organised labour and the state.

While Chamber of Mines did not delve into the arena of organisational rights, it dealt with the rights of minority trade unions. Whereas the disputes in Bader Bop and SACOSWU fell under the broad international and local constitutional right to freedom of association, the dispute in Chamber of Mines fell under the right to engage in collective bargaining and the concomitant right to strike. In this case, one of the LRA provisions under scrutiny was s 23(1)(d). On a plain reading of the section it is clear that collective agreements can be extended to non-parties, as long as it was the majority union or unions that had concluded the collective agreement in question and had provided that the rule of law had been observed, and the extension met the legality requirement. It came down to whether or not the unions that concluded the collective agreement were the majority, which is a question that was dependent on the interpretation of the definition of ‘workplace’. Considering the definition contained in the LRA, the Court cannot be faulted for its interpretation of the concept. Where Chamber of Mines may have differed with Bader Bop and SACOSWU was in its approach to interpreting the LRA. In the last two mentioned cases the Court was willing to interpret the LRA in such a manner that the rights of minority trade unions were given preference over the principle of majoritarianism. In Chamber of Mines, the Court was not persuaded to find that s 23(1)(d) of the LRA unjustifiably limited the right of minority trade unions to strike. In this instance the principle of majoritarianism trumped the rights of minority trade unions.

While the decision of Chamber of Mines is a credible one, there is one aspect that should have been more carefully considered. This is the question of whether the extension of collective
agreements as per s 23(1)(d) should be regulated, in the same way that is done in s 32 of the LRA. This came under discussion in both the LC and LAC in deciding whether there was a less restrictive way of limiting the right to strike caused by s 23(1)(d).\textsuperscript{107} While both the LC and LAC rejected the administrative regulation of the extension of a collective agreement, this should have been discussed by the Constitutional Court.\textsuperscript{108}

While it is understandable that the Court favoured majoritarianism to bring about orderly collective bargaining, it could have at the same time sanctioned the provision of safeguards in such instances, so that some protection is afforded to minority trade unions. Even though the section-32 procedure of the LRA, that deals with the extension of bargaining councils, deals with formal requirements, it could have a substantive bearing on minority trade unions. This section provides that the Minister of Labour must be requested to extend bargaining council agreements to minority trade unions.\textsuperscript{109} Such agreements will not be extended if the Minister is not satisfied that the bargaining council has a mechanism in place in terms of which minority parties may apply for exemption from the provisions of the collective agreement to an independent panel.\textsuperscript{110} Such an independent decision-making panel has the function of determining whether, on the facts, the minority union has provided reasons why the agreement should not be extended to them. It is submitted that this opportunity to be heard, provides protection to minority unions. There are no such safeguards for the extension of collective agreements that are not concluded at bargaining councils that could potentially assist the protection of the rights of members of minority trade unions. Although the Court in \textit{Chamber of Mines} explained that a s 23(1)(d) agreement is not without safeguards, as it is subject to judicial scrutiny, by way of a review under the principle of legality, it is not an accessible procedure, as the one prescribed under s 32.

\section*{VII CONCLUSION AND RECOMMENDATIONS}

It is submitted that none of the cases were wrongly decided in the context of the current wording of the LRA. As it stands, the LRA is the result of a policy choice that the architects of the LRA crafted in the early 1990s. Yes, the cases dealing with organisational rights followed an accommodating approach towards minority trade unions, and the one dealing with the extension of collective agreements gave credence to majoritarianism. However, this occurred under different fundamental rights: the one under freedom of association and the other under collective bargaining.

What is clear is that there is some misalignment between the LRA and international norms and constitutional values in that the LRS fails to articulate these norms and values expressly. It took creative interpretation from the courts to get to a point where the door is not closed on minority trade unions to gain organisational rights that essentially fall under the right to freedom of association.

How then, should the LRA have been differently structured? Admittedly so, the suggestions that follow should be viewed from a hypothetical and academic point of view. The proposal should be viewed as broad brush strokes devoid of details that should ideally foster and feed future debates and negotiations between social partners. Future discussion would necessitate

\begin{itemize}
\item \textsuperscript{107} \textit{Chamber of Mines} LC (note 82 above) at para 72. \textit{Chamber of Mines} LAC (note 82 above) at para 120
\item \textsuperscript{108} \textit{Chamber of Mines} LC ibid at para 72 and \textit{Chamber of Mines} LAC ibid at paras 120–123.
\item \textsuperscript{109} LRA s 32(1).
\item \textsuperscript{110} LRA s 32(3)(dA).
\end{itemize}
a broader reconfiguration of the LRA in a significant way and the points raised here would undoubtedly need to be balanced with other aspects of the LRA that were not covered here. These include the tweaking of aspects such as lock-outs, the use of replacement labour, picketing, the resolution of violent strikes and those of long duration, and the dismissal of employees based on operational grounds during strikes.

The first aspect that should theoretically be changed is to remove aspects relating to access to the workplace, the deduction of trade union dues and the right to appoint trade union representatives for the purpose of addressing individual grievances and disciplinary matters from the chapter dealing with collective bargaining and to place these aspects under the chapter that deals with freedom of association. The alternative would be to change the current requirements for the acquisition of statutory organisational rights to the effect that there is no requirement pertaining to representivity regarding these organisational rights.

The second aspect would be to remove s 18 from the LRA. It does not make sense to keep a section in the LRA that seemingly permits majority trade unions and employers to establish threshold agreements to the exclusion of minority trade unions and then in the next breath to permit minority unions to conclude collective agreements about any of the organisational rights. In line with the removal of s 18 of the LRA, s 21(8C) would likewise need to be eliminated as it is directly linked to threshold agreements entered into in terms of s 18.

Thirdly, similar safeguards should be included in respect of the extension of collective agreements not concluded at bargaining councils to the ones that apply to the extension of bargaining council agreements.

A longer term solution requires the legislature’s interrogation of the continued relevance of the principle of majoritarianism. This has been the subject of debate. The questioning of this principle is understandable considering the fact that the circumstances that existed when the LRA was adopted are no longer the same. Perhaps it is time that the legislature started to engage with the idea of changing its policy stance.

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‘Swartman’: Racial Descriptor or Racial Slur?  
*Rustenburg Platinum Mine v SAEWA obo Bester*  
[2018] ZACC 13; 2018 (5) SA 78 (CC)

**JOANNA BOTHA**

**ABSTRACT:** This article uses speech theory to assess the harm constituted by the speech acts in two Constitutional Court cases, namely *Rustenburg Platinum Mine v SAEWA obo Bester and Others* and *Duncanmec (Pty) Ltd v Gaylard NO and Others*. I argue that racist speech should be treated as a subordinating and oppressive speech act, with illocutionary force, where the speaker enacts harm through the words used. In the context of the factual matrix in *Rustenburg Platinum Mine* and with reference to the racial descriptor, ‘swartman’, I show that such speech can perpetuate structural inequality, and has the capacity to perpetuate unjust social hierarchies. In comparison, the struggle song at issue in *Duncanmec (Pty) Ltd Gaylard NO and Others*, when assessed in context and with reference to the hierarchy of the actors involved, did not have the ability to enact subordination. The analysis demonstrates that an appreciation of the illocutionary force of racist speech and its capacity to enact identity-oppression enhances the balancing of the benefits of the promotion of free speech against the need to regulate and censor harmful speech.

**KEYWORDS:** equality, hate speech, racist speech, speech theory, subordination

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I INTRODUCTION

In 2018 the Constitutional Court delivered two judgments in which it was required to engage with the problem of ‘hate speech’ on the grounds of race, often also called ‘racist speech’.

The first, Rustenburg Platinum Mine v SAEWA obo Bester and Others, addressed the issue of whether a racial descriptor, ‘swartman’ (translated to mean ‘black man’) could constitute racist and derogatory speech, warranting a dismissal from employment. The second, Duncanmec (Pty) Ltd v Gaylard NO and Others, concerned the problem of whether the singing of a struggle song, containing the lyrics ‘tell them that my mother is rejoicing when we hit the boer’, amounted to racially offensive conduct and justified the dismissal of striking workers.

The Constitutional Court was not required to test the legitimacy of the speech in issue in either case; nor to label the speech used as hate speech. It was merely asked to assess the reasonableness of the respective arbitrators’ awards in the arbitration proceedings — in Rustenburg Platinum Mine, that the use of ‘swartman’ was ‘racially innocuous’; and in Duncanmec that the song was racially offensive and that the employees should be dismissed. Despite this, the Court used the opportunities afforded by the issues in Rustenburg Platinum Mine and Duncanmec to assert its leading role in the elimination of racism and inequality from South African society.

Whilst this is commendable, the analysis in both judgments is unhelpfully vague and generic, with the Court resorting to its now familiar tropes about its

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3 The Constitutional Court leaves space between ‘swart’ and ‘man’. The correct spelling in Afrikaans is ‘swartman’ and is used throughout this article. Both the Labour Court and the Labour Appeal Court correctly used ‘swartman’, as one word.

4 [2018] ZACC 29; 2018 (6) SA 335 (CC) (Duncanmec).

5 Translated into English from the isiZulu. Boer, according to the Duncanmec Court at para 37, means either farmer or white person. See too Afri-Forum & Another v Malema & Others [2011] ZAEQC 2; 2011 (6) SA 240 (EqC), where the Equality Court held that a similar song qualified as hate speech in terms of s 10(1) of the Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000.

6 Rustenburg Platinum Mine (note 2 above) at para 1.

7 Duncanmec (note 4 above) at para 1.

8 Duncanmec ibid at para 7; Rustenburg Platinum Mine (note 2 above) at para 37, the Court holding that: ‘In addition, this Court is obliged, as a custodian of the Constitution, to ensure that the values of non-racialism, human dignity and equality are upheld and in doing so it has a responsibility to deliberately work towards the eradication of racism. Our Constitution is the embodiment of the values, both moral and ethical, which bind us as a nation and which as a nation we strive to achieve. As this Court aptly held “[t]he Constitution is the conscience of the nation’’. The Court echoed the judgment of the Chief Justice in South African Revenue Service v Commission for Conciliation, Mediation and Arbitration & Others [2016] ZACC 38; 2017 (1) SA 549 (CC) at para 9.
obligation to uphold the Constitution, and the need to promote the constitutional values of equality, dignity and non-racialism.⁹

In this article I shall demonstrate, with particular reference to the decision in Rustenburg Platinum Mine, that the Court’s fixation on the meaning of the speaker’s words, and the perceived need to test the legitimacy of such words by way of an objective test, resulted in a conflation of the harmful content of the speech and the harm constituted by the speech act.¹⁰ I shall use a linguistic approach to assess the harm of the impugned speech act. My aim is to demonstrate that the reason why certain racist speech acts should not be tolerated is because, in addition to causing harm, racist speech plays a critical role in the perpetuation of structural inequality and racist attitudes.¹¹ I shall argue that the Court missed the opportunity to account substantively for the inherent power of speech to enact social hierarchies and harm.

The approach I take in this article is as follows: part II contains an overview of the factual scenario in Rustenburg Platinum Mine and an analysis of the reasoning of the Labour Court, the Labour Appeal Court and the Constitutional Court. In part III I introduce speech theory and explain how racist speech, including utterances such as ‘swartman’, has the potential to enact harm, regardless of the speaker’s intention or awareness of the impact of the speech. Thereafter, in part IV, I deal specifically with racial slurs and analyse whether the term ‘swartman’ should be treated as an innocuous racial identifier. I illustrate that the use of derogatory racial identifiers in contexts such as that in Rustenburg Platinum Mine has the inherent potential to enact social hierarchies, causing such utterances to fall within the realm of racist speech. In part V, I contrast the speech and circumstances in Rustenburg Platinum Mine with the singing of the struggle song in Duncanmec and use speech theory to demonstrate why the speech in Rustenburg Platinum Mine was more objectionable. I conclude in part VI by highlighting that the Constitutional Court’s treatment of racist speech through the traditional hate speech regulatory lens, through which the focus is on the meaning of the words used and the harm caused thereby, is unnecessarily restrictive. In my view, the Court’s reasoning in both Rustenburg Platinum Mine and Duncanmec would have been substantially enhanced by a more nuanced understanding of the harm enacted by racial speech as a subordinating speech act.

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¹¹ I acknowledge that South Africa is not alone in addressing this problem. See the work of Rae Langton, who has said that ‘the relationship between speech and power is a large and daunting topic.’ R Langton ‘Speech Acts and Unspeakable Acts’ (1993) Philosophy and Public Affairs 293, 298. And, as to legal regulation, Alex Brown explains that the difficulty in defining hate speech is caused by the fact that its regulation provokes ‘strong moral reactions’ and that legal meanings ‘draw on a range of deeper values and principles about which people reasonably disagree’. See Brown ‘The Myth of Hate Speech’ (2017) (note 1 above) at 422.
Before starting, I stress that I am acutely aware that the incident in Rustenburg Platinum Mine occurred in a workplace setting, resulting in disciplinary consequences for the speaker. The Court was required to review the disciplinary procedures adopted and to assess whether the outcome of the disciplinary enquiry was one that a reasonable arbitrator could have reached. I am neither a labour lawyer, nor an expert in administrative law. I therefore confine myself to the narrow, but critically important, question of whether the speech act at issue constituted racist speech worthy of censure.

II THE SPEECH AND REASONING IN RUSTENBURG PLATINUM MINE

The Constitutional Court commenced its unanimous judgment (per Theron J) by explaining that it had to decide whether the usage of the term ‘swartman’ (translated as ‘black man’) to refer to a colleague was racist and derogatory within the factual confines of the case and, if so, whether: a) it was appropriate for the CCMA Commissioner to conduct arbitration proceedings and declare the speech harmless; and b) the dismissal of the employee was the appropriate sanction.13

The brief factual background was as follows: the applicant (Rustenburg Platinum Mine) dismissed Mr. Meyer Bester (a white man) for insubordination and racism because he referred to a ‘colleague’ (Mr. Solly Tlhomelang, employed by a sub-contractor in the mine, and a black man) as ‘swartman’. The applicant alleged that this conduct breached the applicant’s disciplinary rule which prohibits abusive and derogatory language and, in particular, racist remarks.14

The incident occurred in relation to a dispute concerning adjacent parking bays.15 Bester was seemingly concerned that Tlhomelang’s vehicle limited his reversing space (both vehicles were equally large) and that this situation could cause damage to his vehicle. Bester raised the issue with Mr. Sedumedi, the Chief Safety Officer, but without success. On the applicant’s version, which the Court accepted, Bester then stormed into a meeting, and pointed his finger at Sedumedi, saying in a loud and belligerent manner, ‘verwyder daardie swartman se voertuig’ (translated by the Court to mean ‘remove that black man’s vehicle’),16 and threatened that otherwise he (Bester) would take the matter up with management. Tlhomelang was present in the meeting. This evidence was supported by four witnesses, two of whom were offended by the speech. Ironically, however, Tlhomelang testified that he personally was not affronted by the speech. Bester denied the altercation and claimed that he did not utter the term ‘swartman’. A disciplinary hearing was held in which Bester was found guilty of insubordination by disrupting a safety meeting and for making racial remarks. He was dismissed. Bester then referred the dispute to the CCMA and a series of legal fracases commenced.

The CCMA Commissioner found in Bester’s favour and ordered his retrospective reinstatement. The Commissioner’s decision was overturned on review by the Labour Court (LC).17 With reference to its previous decision in Modikwa Mining Personnel Services

12 Commission for Conciliation, Mediation and Arbitration.
13 Rustenburg Platinum Mine (note 2 above) at para 1.
14 Ibid at paras 2–3.
15 Ibid at paras 3–4.
16 The Court, however, did not focus attention on the perjorative ‘daardie’ in the utterance, an issue which is explored in the analysis below.
17 Rustenburg Platinum Mine v SAEWA obo Bester & Others [2016] ZALCJHB 75.
v Commission for Conciliation Mediation and Arbitration and Others, the LC held that racism remains ‘prevalent in South African workplaces’ and that the use of ‘racial identifiers’ perpetuates racial stereotypes. It added that racism, as a social construct, is infused with ‘ideological baggage’ and has the potential to subjugate others, especially where persons from particular race groups are viewed as the ‘other’. The LC concluded that the use of ‘swartman’ in these circumstances was not a mere identifier and that the speech was both derogatory and racist. Using the test established by the Constitutional Court in Sidumo and Another v Rustenburg Platinum Mines and Others Limited, the LC held that the Commissioner ‘reached a decision that a reasonable decision-maker would not have reached’. The LC’s recognition that the notions of othering, difference and unequal power relations are core aspects of racist speech is insightful and worth exploring further, as I demonstrate in part III below.

The Labour Appeal Court (the LAC) overturned the LC’s decision and found that whilst the racial identifier in issue was offensive, it was neither derogatory, nor racist. The term was used merely to identify Tlhomelang, as the owner of the relevant vehicle. Although the Constitutional Court was critical of the LAC’s evaluation of Bester’s evidence and its conflation of the respective versions, aspects of the LAC judgment are critical for the analysis that follows, and are therefore addressed here to frame the discussion.

The LAC first acknowledged the imperative to outroot racism in the workplace. It then held that an objective test should be applied to determine whether ‘swartman’ had been derogatory. This test, said the LAC, is not based on how the employer understood the words, nor on the subjective feelings of the person targeted, but on whether a reasonable, objective and informed person would have perceived the words to be objectionable. The LAC stressed the importance of context, holding that ‘swartman’ should ordinarily be treated as neutral, only acquiring a ‘pejorative’ meaning in special circumstances. The LAC appeared to recognise the inherent tension between the constitutional promise of the establishment of ‘a truly equal society, embracing non-racism’ and the need to address the racial inequalities of the past.

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21 Para 14 of SAEWA obo Bester (note 19 above) contains detailed extracts of the LC’s judgment.
22 SAEWA obo Bester (note 19 above).
23 Ibid at para 25.
24 Ibid at para 46.
25 Ibid at para 16.
26 Whilst the LAC did not explain its understanding of a pejorative meaning, I take the LAC to have used this term to mean that the speaker expressed contempt or disapproval. See the discussion in part III below.
which tension requires recognition that racial categories are regularly employed in society. It observed, for example, that it is a valid concern that the use of race descriptors to identify people of different races permits the categorisation of people into social groupings, which is comparable to racial stereotyping, and perpetuates othering. Yet, despite this understanding, the LAC opined that it could not ignore that racial descriptors remain common in South African society, often occurring inadvertently in conversation, or even as a means to advance black consciousness and identity-politics. Thus, according to the LAC, it should be careful to condemn racial descriptors as this would be too ‘absolute’ a stance. In this section of its judgment, as discussed below, the LAC overlooked the central role that racially-loaded speech plays in the enactment and perpetuation of unjust social hierarchies, even when this occurs unintentionally or during an ordinary conversation.

The LAC then employed aspects of Bester’s evidence to support its ruling that his use of ‘swartman’ in the particular context of the case was not racist. These included findings that: Bester did not know Tlhomelang (corroborated by Tlhomelang); that Bester did not object to parking next to Tlhomelang (on the grounds of race); that Bester had no reason to denigrate Tlhomelang; that Bester used ‘swartman’ merely to identify Tlhomelang; and that Bester did not have a racist intent. Thus, the LAC concluded that although Bester ‘may have been unwise to opt for this descriptor’, the context demonstrated that Bester could have used ‘swartman’ merely to describe Tlhomelang, whose name he did not know. Accordingly, the LAC found that the LC erred in holding that the Commissioner ‘reached a decision that a reasonable decision-maker would not have reached’.

The Constitutional Court reversed the LAC’s finding. The Court accepted that the matter was a constitutional one as it required an analysis of constitutional rights, and raised the important question of whether a speech utterance amounts to racism. The Court reiterated the need to obliterate racism in South Africa and stressed that ‘as a custodian of the Constitution,’

27 The argument is that this approach perpetuates racial differences and hierarchies, and may threaten the non-racial project. Yet, a failure to recognise the impact of racism and power relationships has the capacity to amount to an endorsement of racial inequality and undermines the constitutional commitment to the progressive realisation of substantive equality. See generally J Modiri ‘Race, Realism and Critique: The Politics of Race and Afri-forum v Malema in the (In)equality Court’ (2013) South African Law Journal 274; J Modiri “Towards a ”(Post-)apartheid“ Critical Race Jurisprudence: “Divining our Racial Themes”” (2012) Southern African Public Law 232.

28 SAEWA obo Bester (note 19 above) at para 29.

29 Ibid at paras 19, 29. The example employed by the LAC is the following: ‘the unidentified person who called yesterday was a black man’. Regarding the problem of the use of race in the black consciousness movement work, the LAC states: ‘If it were considered to be so, then organisations seeking to perpetuate black consciousness and identity would be subject to outright condemnation — and our society has yet to adopt so absolute a stance’. The mistake the LAC makes is to provide an example of the use of the words in a situation in which the speech does not have illocutionary force (an issue which is addressed below).

30 Ibid at paras 25–27.

31 Ibid at para 23.

32 Ibid at paras 23, 26, 27.

33 Ibid at para 27.

34 Ibid at para 40. Earlier on in the same para the LAC uses the term ‘could’ — the Constitutional Court’s disdain for the use of ‘would’ seems somewhat misplaced. See Rustenburg Platinum Mine (note 2 above) at fn 12.

35 Rustenburg Platinum Mine (note 2 above) para 31, the rights cited were dignity, equality and fair labour practices.

36 Ibid at para 32.
it was obliged to ensure that ‘the values of non-racialism, human dignity and equality are upheld.’

On the merits, the Court confirmed that an objective test should be used to determine whether the words used were racially derogatory, but with an important rider. The Court held that:

The Labour Appeal Court’s starting point that phrases are presumptively neutral fails to recognise the impact of the legacy of apartheid and racial segregation that has left us with a racially charged present. This approach holds the danger that the dominant, racist view of the past — of what is neutral, normal and acceptable — might be used as the starting point in the objective enquiry without recognising that the root of this view skews such enquiry. It cannot be correct to ignore the reality of our past of institutionally entrenched racism and begin an enquiry into whether or not a statement is racist and derogatory from a presumption that the context is neutral — our societal and historical context dictates the contrary. In this sense, the Labour Appeal Court’s decision sanitised the context in which the phrase ‘swart man’ was used, assuming that it would be neutral without considering how, as a starting point, one may consider the use of racial descriptors in a post-apartheid South Africa.

It added that despite the Constitution’s acknowledgment of the need to overcome the racial strife and societal divisions of the past order, ‘racial prejudices have not disappeared overnight, and they stem, as demonstrated in our history, from a misconceived view that some are superior to others’. As a result,

(g)ratuitous references to race can be seen in everyday life, and although such references may indicate a disproportionate focus on race, it may be that not every reference to race is a product or a manifestation of racism or evidence of racist intent that should attract a legal sanction. They will, more often than not, be inappropriate and frowned upon. We need to strive towards the creation of a truly non-racial society.

The Court concluded that the LAC erred in finding that Bester’s use of ‘swartman’ was a mere racial descriptor and racially innocuous. Moreover, according to the Court, the LAC’s application of the objective test had been too strict, because it ‘sanitised’ the context and the totality of the circumstances in which the words were uttered. This approach prompted a somewhat blurred account to the effect that the test was not whether the witnesses had been correct in their understanding that the statement was racist, but rather whether ‘objectively the words were reasonably capable of conveying to the reasonable hearer that the phrase had a racist meaning. Only Mr Bester could have given evidence that he uttered the words with no racist intent. He failed to do so.

The CCMA Commissioner’s decision was set aside, as one that a reasonable decision-maker could not have reached. The Court held that the Commissioner had relied incorrectly on Bester’s apparent defence that he used the term ‘swartman’ as a racial descriptor and

37 Ibid at para 37. The Court referred to its earlier decision in South African Revenue Service (note 8 above) where it held at para 29 that ‘The central feature of this case is the mother of all historical and stubbornly persistent problems in our country: undisguised racism.’
38 Rustenburg Platinum Mine (note 2 above) at para 45.
39 Ibid at para 48.
40 Ibid at para 52.
41 Ibid at para 53.
42 Ibid at para 49.
43 Ibid at para 50.
44 Ibid at para, using the test in Sidumo (note 20 above).
not as a derogatory or racist slur. This was a flawed approach. In fact, Bester had denied uttering ‘swartman’. He had also conceded that if he had used these words, that could have amounted to a dismissible offence. Thus, both the Commissioner and the LAC erred by relying on non-existent evidence to conclude that Bester’s speech was innocuous. The Court, accordingly, confirmed Bester’s dismissal, remarking that he had shown no remorse and that he had not acquired the ability to behave in a way that respects the dignity of all his co-workers.

I shall demonstrate in the analysis below that despite some valuable insight into the real issues, specifically the tendency to approach skewed racial relations from a neutral or colour-blind perspective, the Constitutional Court gave insufficient attention to the relationship between the form of the speech act in issue and the hierarchy of the actors involved. An appreciation of this synergy and the power of speech would have enhanced the understanding of the harm constituted by Bester’s utterance. Additionally, in its assessment of whether the utterance amounted to racist speech worthy of censure, the Court conflated the meaning of the words, their force, the speaker’s intention and the causal consequences of the utterance. The better approach is to consider the illocutionary force of an utterance such as ‘swartman’, with specific reference to the speakers involved and the societal context. It is to this analysis that I now turn, with the aim of applying the principles discussed to the factual scenario and speech type in issue in Rustenburg Platinum Mine and then juxtaposing the speech with the struggle song in Duncanmec.

III SPEECH THEORY INTRODUCED

A The harm caused by hate speech versus the harm enacted by hate speech

It is trite that speech can be used to do many things — it can insult, offend, harass, derogate, threaten, frighten, demean, humiliate, browbeat and oppress people. On the other hand, speech is regarded as valuable as a means to assert self-autonomy and individual fulfilment, to attain the truth, and to promote democratic self-government. These and a number of other rationales for freedom of expression create what has been called a ‘free speech-principle’,
providing a substantive basis for the protection of freedom of expression. However, despite the importance of the right to freedom of expression in society, it can also be exceptionally harmful. The right is thus not absolute and most democracies accept that speech can be legitimately regulated. The difficulty lies in determining which types of speech are deserving of the law’s intervention, with the harm principle being the traditional way of determining the dividing line. Simply put, only acts of expression that cause sufficient harm to others should be unworthy of the law’s protection.

Numerous theorists have written about the harm caused by hate speech and the need to regulate such speech. However, most justifications for hate speech bans have developed as counter-arguments to the rationales underpinning the importance of free expression in a democratic society; and aim to show that hate speech is unworthy of protection and should be censored. Consequently, the justifications for hate speech prohibitions usually focus on the harm caused by hate speech to illustrate that it does not sufficiently promote the free speech rationales. It is thus not surprising that some of the reasons advanced for excluding hate speech from the scope of protected speech include the following: that hate speech impairs the dignity and self-esteem of speakers, listeners, bystanders and victims (to counter the autonomy rationale); that hate speech is incapable of advancing the truth and that the attainment of knowledge cannot be elevated above other important rights and values, such as human dignity.
(to refute the truth rationale); that hate speech undermines political participation and damages democratic self-government (to show that hate speech is not essential in a democracy); that hate speech results in acts of discrimination against targeted groups, inter-group violence, structural inequality and the lessening of social cohesion (to show that hate speech causes extensive harm); and so on. The hate speech ban proponents accordingly argue that the extent and type of harm caused by hate speech justifies its regulation.

Yet, this approach is restricted because it focuses merely on the harm that speech causes (the so-called perlocutionary effects of speech). The various arguments usually run into trouble for three reasons. Firstly, it can be difficult to show the causal interconnection between the speech and the harm. Secondly, there is considerable uncertainty about the threshold of harm needed to warrant state intervention, which involves a balancing of the harm caused by hate speech and the impact on the right to freedom of expression. Thirdly, the hate speech concept is nebulous at best and allows for the regulation of a wide variety of speech acts, including offensive, insulting and hurtful speech. This feature has prompted critiques that the hate element in most hate speech is misleading, because the threshold for what constitutes ‘hate’ differs between jurisdictions — some laws require that the perpetrator be motivated by hatred whereas others require only prejudice, offence or intolerance.

The reason why the causal harm approach to hate speech regulation struggles to filter out the distinction between speech which should be tolerated and speech which should be censored is because it fails to take into account the performative force of the speech act itself — that is, what speech does as speech. The over-emphasis on the causal harm of hate also

59 Schauer (note 51 above) at 25–26, 33; R v Keegstra 1990 3 SCR 697 at para 87 (Dickson CJ reasoned that untrue statements cast as hate speech are unlikely to further knowledge or ‘lead to a better world’ and therefore cannot be justified by the truth rationale); Cohen-Almagor (note 57 above) at 9–10. In South Africa, see Khumalo & Others v Holomisa [2002] ZACC 12, 2002 (5) SA 401 (CC) at para 35. See also the judgment of Cameron J in The Citizen 1978 (Pty) Ltd & Others v McBride [2011] ZACC 11, 2011 (4) SA 191 (CC) para 78, holding that ‘truth-telling’ is one of the tenets of the transition from the injustices of the past to democracy and constitutionalism. In Afri-forum (note 5 above) at para 33 the Court held that hate speech should not be respected merely because speech promotes the truth.


61 See generally the texts referred to in note 55 above.


64 Brown ‘The Myth of Hate Speech’ (note 1 above) at 421–422.


tends to ignore the reality that language operates in concert with existing social practices and hierarchies, and is core to social interaction. One way of overcoming these problems is to use the constitutive harm approach to speech regulation, where the focus is not on speech causing harm, but on speech as harm — the illocutionary force of the words. Here, the relationship between speech theory and identity oppression, including the social hierarchical structures in which racist speech usually manifests itself, is key. This way of solving the hate speech problem is becoming increasingly influential and is aligned with concerted trans-disciplinary efforts worldwide to show that the link between speech acts and other forms of expressive conduct should be part of our attempt to understand and explain identity-based oppression and social hierarchies. In short, if we wish to diagnose the link between speech and group-based disadvantage, we need to explore how speech acts, including racial slurs and racist names, not only enable the depiction of marginalised people as unwanted out-groups, but also enact this social hierarchy. The benefit of this approach is that it adds another more nuanced dimension to the traditional regulatory framework for racist speech in the South African context, which requires balancing the harm of the speech and the need to promote freedom of expression.

B Hate speech and speech-act theory — racist speech as subordination

The constitutive harm approach requires an understanding of speech act theory and the potential of words to do ‘things’. The usual point of departure is JL Austin’s work, *How to Do Things with Words*, in which he assessed the performative quality of language. Austin classified speech acts into three main types: locutionary, illocutionary and perlocutionary. A locutionary act, quite simply, is to state something which has meaning or content. The locution concerns the content of the speech and fixes meaning. An illocutionary act is the action performed in saying something, also described as an act that is done with words. Examples include warning, ordering, betting, marrying and the like (‘I promise’; ‘I bequeath’; ‘I bet’ and ‘I do’). A perlocutionary act, on the other hand, is the action performed by saying something, or the act

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68 This is a growing area of research evidenced by the more frequent use of trans-disciplinary approaches (sociology, linguistics, criminology, legal theory, philosophy) to solve problems in hate speech scholarship. Sociologists research the relationship between hate and group dynamics, focusing on the othering of out-groups. Psychologists usually work with the victims of hate speech, considering the impact of group-hatred on victims. Political scientists address the issue of hate in public and political discourse, and consider the impact of such speech on political outcomes. Criminologists consider the question of the criminalisation of conduct or speech that promotes group-hatred. Linguists investigate the nature of the speech acts comprising hate speech. See A Brown ‘What is Hate Speech? Part 2’ (note 1 above) at 566.

69 Simpson (note 50 above) at 558.


71 R Langton & J Hornsby ‘Free Speech and Illocution’ (1998) *Legal Theory*, who also argue that we need to appreciate that ‘speech is not just a matter of making meaningful noises, but … of doing things with words’ at 23.

72 Austin’s basic premise is that to say something is to do something, and that this can entail a number of different things, JL Austin *How to Do Things with Words* (1962) 12. See the criticism of Austin’s work in JR Searle ‘Austin on Locutionary and Illocutionary Acts’ (1968) *The Philosophical Review* 405.
that is the consequence of the words (such as the impact on the feelings, thoughts or conduct of the audience or the speaker). For Austin the distinction here between in and by is crucial, with a perlocutionary act described as ‘what we bring about or achieve by saying something’. Austin added that, although both illocutions and perlocutions are performatives, there is a tendency to blur the distinction between what is done with words — that is the illocutionary act — and what is done because of words, the perlocutionary act. The distinction in the context of this article is crucial because of the importance of distinguishing the harm constituted by the speech act (the illocutionary force) as opposed to the harm caused by the speech (the perlocutionary force). In short, speech can constitute a form of action.

The difference between these speech acts is best explained with reference to Austin’s example of the following statement: ‘He said to me: “Shoot her”’. The locutionary meaning / content of these words is that he said ‘shoot’ with reference to a particular person, namely ‘her’. The illocution in saying ‘shoot her’ is that he was ordering me to shoot her. The perlocution is that if I shoot her, the consequence of the words uttered will be that I shot her (and perhaps she will die).

Austin’s speech theories have been adapted by a number of scholars, including Mari Matsuda, Mary Kate McGowan, Rae Langton, Jennifer Hornsby, and Catharine MacKinnon, and applied to explain the harm enacted first by pornography and then by racist speech. These theorists argue that it is inadequate to treat the regulation of pornography and racist speech through the limited free speech / censorship lens. Instead, the focus should be on the relationship between speech, inequality, structural oppression and subordination, with a recognition that speech plays a pivotal role in the enactment and perpetuation of structural hierarchies. In particular, racial utterances are not merely a symptom of racism, but constitutive thereof. The failure to take into account the illocutionary harm of racist speech also leads to an inadequacy in the balancing process and wider reasoning of the courts when deciding how to weigh the promotion of free speech against the regulation and censorship of hate speech.

73 Austin ibid at 101. It should be clear that a particular utterance may not actually bring about its perlocutionary effect.
74 It is acknowledged that this is a simplification of Austin’s theory and that Austin did not address the question of hate speech or racist speech.
75 A performative utterance is one that does more than merely describe a given reality. Performatives also change the social reality they are describing.
76 Matsuda (note 55 above).
77 McGowan (note 62 above) at 389. McGowan uses David Lewis’s conversational score theory to explain that moves in conversations are rule based, similar to plays in a baseball match.
79 Langton & Hornsby (note 71 above) at 21.
81 It is acknowledged that these arguments were developed to overcome the First Amendment free speech position. See generally A Meiklejohn ‘The First Amendment is an Absolute’ (1961) The Supreme Court Review 245; Schauers (note 51 above) at 7–10; K Greenawalt Speech, Crime and the Uses of Language (1989) 33–34.
82 This insight may not necessarily lead to particular legal outcomes, but would aid an understanding of the nature and weight to be attached to the particular harms of racist speech (particularly in the South African context). I thank David Bilchitz, the editor of this article, for the point.
To return to the work of the analytical feminist scholars, and starting with pornography, MacKinnon\(^3\) and Langton\(^4\) contend that pornography both enacts the subordination of women (the illocutionary force of subordination) and causes the subordination of women (the perlocutionary effect). Pornography also silences women and, for these reasons, should not be protected by the law.\(^5\) The subordination and silencing claims have been extended to racist speech to provide an alternative normative basis for its regulation.\(^6\) Speech, says Langton, has both causal and constitutive aspects.\(^7\) Just like the act of pornography, the racist speech act is both injurious and harmful in itself. It too subordinates and silences its victims, with Langton understanding subordination to include the creation of social norms which construct social inequality for victims, the undermining of their rights and powers, and the framing of what constitutes acceptable behaviour towards victims.\(^8\) In addition, the same speech act promotes harm (in the form of racial discrimination or violence or harassment and the like). So, the speech act both causes subordination and oppression of its targets (the perlocutionary effect)\(^9\) and constitutes subordination (the illocutionary force thereof). Subordination cannot be viewed merely as a downstream or secondary harmful effect of racist speech.\(^10\) Instead, the very act of engaging in speech of this type is a harmful subordinating act. Racist hate speech should thus not be cast merely as a form of uncivil speech which causes harm, but as a speech act that is harm, because it reinforces and perpetuates the more ‘tangible’ forms of discrimination or identity-based violence or oppression.\(^11\) The crucial question in the context of this article, which I address shortly, is whether a racial ‘descriptor’ in the form of ‘swartman’ can be equated with speech of this type.

Langton illustrates her theory with reference to the enactment of a South African apartheid-era type law. She explains that where the legislator enacts a law that states that ‘Blacks are not permitted to vote’ the legislator is doing more than simply expressing its racist views about the black citizens of South African society (the locutionary act). The enacted law

\(83\) MacKinnon (note 80 above).


\(86\) In brief, the argument is that ‘identity-oppressive speech’ is a critical component of the way in which identity-oppression and inter-group subordination occurs. The speech acts are not merely elements in the causal chain. They are part and parcel thereof, Simpson (note 50 above) at 558–559.


\(89\) See the work of Matsuda, Delgado, and others, as set out in note 55 above.

\(90\) For an interesting analysis of the relationship between the regulation of hate speech and discrimination in relation to ‘upstream’ and ‘downstream’ laws, see R Dworkin ‘Forward’ in I Hare & J Weinstein (eds) *Extreme Speech and Democracy* (2011) vii–viii and Waldron (note 56 above) at 178–179.

\(91\) Maitra & McGowan (note 63 above) at 366–367. I am aware of the criticisms of the language-based oppression arguments. One such critique is that despite the many structural changes in western capitalist societies post the 1960s and 1970s, structural inequalities across race and gender remain pervasive. If the enacted laws and institutions aimed at overcoming inequality and oppression are unable to achieve reform, why do we bother to ‘pin the blame’ on language through the medium of speech theory? This critique fails to appreciate that when addressing racist speech, language is the problem. Moreover, speech is a core component of our humanity and defines our autonomy as human beings. Speech is also core to social interaction. See too Simpson (note 50 above) at 559–560.
is also a perlocutionary act because it has the effect of preventing black people from voting. More importantly for this context, the law is an illocutionary act and, in particular, an act of subordination, because: a) it ranks black citizens as less worthy than other (white) citizens; b) it actually deprives black people of rights and powers; and c) it legitimates discriminatory conduct against black people. All of these count as subordinating illocutions. Just like an open act of discrimination, such as the refusal in a shop to serve a Muslim man wearing a fez, the legislator’s statement also constitutes a subordinating act, this time in the form of speech. ‘Whites only’ signs and other such displays, including restaurateurs or guesthouse owners who instruct their employees not to serve persons from an ‘out-group’, have exactly the same purpose.

The utterance in *Rustenburg Platinum Mine* comprised the following words: ‘verwyder daardie swartman se voertuig’. How would it fit into Langton’s taxonomy of racist speech? The meaning of these words (the locutionary content) is ‘remove that black man’s vehicle’. The perlocutionary effect of the words, if Bester’s demand had been successful, is that Sedumedi would have taken steps to assign Tlhomelang another parking bay. It is, however, the illocutionary impact of the use of ‘daardie swartman’ with which we are concerned. Did the racial descriptor, used in an aggressive tone, and coupled with the demonstrative ‘daardie’ subordinate Tlhomelang? I believe it did. The use of ‘swartman’ in this context was more than a mere speech mechanism designed to identify Tlhomelang, who happened to be a black man, as the owner of the vehicle in issue. Instead, the racial name amounted to a form of ‘othering’ and served to rank Thlomelang as belonging to an out-group. Moreover, the use of ‘daardie’ in combination with ‘swartman’ and the ordering tone used by Bester aggravated the force of the utterance and the inherent insult. In this way, Bester’s words enacted the existing social hierarchical structures between black and white people.

In part IV below I add to this analysis when I discuss the features of racial slurs and apply these to ‘swartman’. Before doing so, however, an obvious objection is that Bester’s speech is not comparable to Langton’s legislator example, because he did not have the authority to subordinate Tlhomelang. It is clear that Bester did not possess the same basic power as the South African legislator or even the restaurateur and, therefore, if he did have power, it was acquired through other means. I now address this problem.

**C The problem of authority**

Langton, like others, is aware of the critique that in the legislator example, the illocutionary act was successful, because the speaker had authority. The reality is that in many cases of ordinary racist speech (if such speech can ever be called ordinary), the speaker lacks authority.

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93 This is a South African example: see *Woodways CC v Vallie* [2009] ZAWCHC 155, 2010 (6) SA 136 (WCC).
95 Langton ‘Speech Acts’ (1993) (note 78 above) at 304, saying ‘The authoritative role of the speaker imbues the utterance with a force that would be absent were it made by someone who did not occupy that role.’ Similarly, where a restaurant owner introduces a policy which states that no foreign nationals may be served (here I draw on the current xenophobic attitudes prevailing in our society), the owner has authority over the restaurant and his speech can subordinate. This example is taken from McGowan’s work ‘Oppressive Speech’ (note 62 above) at 393. The restaurateur’s policy is an authoritative speech act. Had the patrons and / or employees uttered the same words, they would not have had the same force.
It is therefore arguable that he or she cannot subordinate. The authority problem is a critical potential stumbling block in the argument. On Austin’s theory, for a speech act to have a successful illocution, certain ‘felicity’ requirements must be met, one of which is that the speaker must have authority. So, does an ordinary speaker, for example, someone on the street corner or on a social media site, who shouts a racial epithet with reference to a person of colour, have authority in the same sense as the legislator who enacts racist laws? Similarly, does a white employee who labels a fellow black employee as a ‘swartman’ have the authority to enact the subordination of the person targeted?

Langton has recently expanded her theory to address the authority problem. She acknowledges, firstly, that not all hate speakers have authority. Nonetheless, even where there is no authority, speech has potential to cause harm, depending on the factors contributing to its power. Here, we are in Austin’s perlocutionary realm and the usual harmful consequences of hate speech are acknowledged. However, according to Langton, where the speaker has authority, the ‘harm in hate speech’ is exacerbated, because of the illocutionary force of the words. Whatever else ‘the harm in hate speech’ is, it is worse when the speaker has authority. An obvious objection to this line of reasoning is that it is circular and creates the impression that racist speech is not harmful unless the speaker has authority. This aspect of Langton’s response is therefore inadequate because we know intuitively that speech uttered by a speaker without authority has the capacity to be harmful. More is required to address the problem of authority.

The second leg of Langton’s riposte is that for hate speech there are many sources of authority, both formal and informal. The legislator has formal authority. Speakers with informal authority, however, can also subordinate. According to Langton, informal

96 Austin (note 72 above) at 28–29.
97 Critics have argued that the authority problem is fatal to the claim that the more banal types of racist speech can subordi- nate. See L Green ‘Pornographizing, Subordinating, and Silencing’ in R Post (ed) Censorship and Silencing: Practices of Cultural Regulation (1998) 285, 297 and N Bauer ‘How to Do Things with Pornography’ in S Shieh & A Crary (eds) Reading Cavell (2006) 68. Green claims that pornography is not authoritative; is low-value speech (disapproved of but tolerated); is used by speakers with low social positions; and cannot subdivide. In response, Ishani Maitra in ‘Subordinating Speech’ in Speech and Harm: Controversies over Free Speech (2012) 94 argues that given the widespread use and sales of pornography, it cannot be treated as low status. Bauer at 86–87 claims that pornography is not authoritative because it cannot authorise the subordination of women. There is quite simply no excuse for those who behave as the speech / pornography suggests they should. She says: ‘It’s because no person or institution that is not formally invested with the authority has such authority apart from individuals’ granting it to them’. Maitra’s response is addressed in note 101 below.
98 Similarly, do striking workers who sing racially loaded struggle songs during a strike have the authority to enact subordination of the people targeted in the song? In this context, I believe not. My argument is set out in part V below.
99 Langton does so in two works, both initially presented as public lectures. See ‘The Authority of Hate Speech’ and ‘Blocking’ (both in note 78 above).
100 Langton ibid at 126. Another argument used to counter the problem of authority includes Matsuda’s claim that where the state fails to regulate or condones racist speech, the speakers have implied state authority to engage in such speech. See Matsuda, referred to in Maitra & McGowan (note 63 above) at 370. Maitra in ‘Subordinating Speech’ (note 97 above) at 94–96 also develops a thought-provoking argument. The question she explores is whether ‘ordinary’ racist speech can subordinate in the same way as Langton’s South African legislator example. Explicitly, if such speakers do not have social authority can their racist speech subordinate? Can their speech rank their victims as inferior, deprive them of the dignity, and legitimate acts of discrimination? Maitra argues that a speaker’s authority need not derive from social position. Instead, authority could be acquired by either derived or licensed authority. Inaction by others in response to racist speech confers authority.
authority can be acquired through ‘presupposition accommodation’, for example where a speaker presupposes authority and no-one objects (the omission aids the accommodation).102 Specifically, where a speaker uses racial epithets and there is no objection from those who hear the speech, the speaker could acquire informal or subtle authority because it becomes presupposed that this type of speech is socially acceptable.103 Silence counts, says Langton, and authority is acquired through the omission.104 The result is that the ‘hate’ is normalised and eventually the speech ‘gains the informal authority of a social practice’.105 In this way ‘ordinary’ hate speakers generally do have authority and their speech has illocutionary force, with the capacity to subordinate.106

The critical question here is whether an utterance in the form of a supposed racial descriptor, such as ‘swartman’, when used by a white man to refer to a black man, would fall into the subordinating category. I claim that it can, acknowledging that my claim is context-dependent and hinges on factors such as the hierarchy of the actors involved, the social and historical context, and whether the speaker used a subordinating tone. We also know, of course, on the facts in Rustenburg Platinum Mine, that Bester’s speech did not go unchallenged. The reality, however, is that speech acts of this type are commonplace in South African society, as evidenced by the numerous occasions on which courts and tribunals have been called upon to address instances of racist speech. For this reason, it is arguable that until confronted, utterances of this sort are part of the social structure and are usually ingrained.107

Another way in which to solve the authority problem is developed by McGowan, who argues convincingly that the enactment of social norms through the use of racist speech does not need any form of special authority.108 She claims that off-hand and everyday remarks in ordinary conversations are mechanisms which impact on patterns of structural inequality, even where the speaker does not intend to engage in oppressive speech, and that this usually occurs in a subtle and obscure manner. The power is derived from social context because our

102 Langton ‘The Authority of Hate Speech’ (note 78 above) at 126. Langton also describes the phenomena as ‘blocking’.

103 See MacKinnon Only Words (note 80 above) at 31, who argues that words and images place people in categories and hierarchies, which eventually, if left unchallenged, become ‘inevitable and right’. In this way, feelings of inferiority and superiority become actualized.

104 Langton ‘The Authority of Hate Speech’ (note 78 above) at 135.

105 Langton speaks of practical and epistemic authority, ‘aided by the acts and omissions of hearers who themselves have, or lack, authority; and how omissions, in particular, aid the acquisition of authority, through presupposition accommodation.’ She argues that Streicher’s anti-Jew propaganda is a classic example of epistemic authority, ‘since it had local credibility, even if it lacked expertise’.

106 Compare the work of Waldron, who although aware of the harm in hate speech and the need for regulation, casts the hatemonger as an outsider or ‘a detested lonely wolf’, that is as a person without authority. Judith Butler is equally critical. She argues that hate speech can never have authority, for this attributes power to the hate speaker. See J Butler Excitable Speech (1997). Note though that Langton does not argue that hate speakers always have authority, but when they do have authority, the subordinating harm is far worse. The speech can still cause harm, but possibly not constitute harm.

107 See, for example, the LAC judgment (note 19 above) at para 30, where the LAC refers to the evidence of a witness, van der Westhuizen, who used a race descriptor, namely ‘daar swart mannetjie’ during the hearing. Ironically, this utterance is arguably even more derogatory than ‘swartman’ as ‘mannetjie’ means ‘small man’, which term could be equated to the derogatory use of ‘boy’ or ‘girl’ to refer to African employees.

behaviour and conversational utterances are contributions (or moves) in norm-based social practices. Moreover, such speech constitutes harm as opposed to just causing harm. The harm is constituted ‘via adherence to norms enacted’ and, in turn, perpetuates social and structural inequality. McGowan adds that her thesis demonstrates that speech is even more harmful than originally conceived; aggravated by the fact that harm occurs even in the hands of non-authoritative speakers, who may not intend to oppress, discriminate or subordinate.

McGowan’s argument is particularly attractive as it explains both the impact of the ‘swartman’ utterance in Rustenburg Platinum Mine and the manner in which Bester, as an ‘ordinary’ speaker, acquired authority to subordinate the target of his speech, Thlhomelang, even though Bester may not have intended to act in a racist manner. In particular, in my view, McGowan’s theory explains how Bester’s speech, subtle and obscure as it may seem on face value, in fact, constituted harm by enacting the prevailing social norms that apply in South African society today. In this way, Bester acquired authority. My argument can be supplemented by an understanding of the illocutionary force of racial slurs, to which I now turn.

IV THE ILLOCUTIONARY FORCE OF RACIAL SLURS

Lynne Tirrell argues persuasively that whilst the normative power of derogatory terms, such as racial epithets, lies in their negative force or impact, the reality is that the mere use of such terms allows their speakers to wield considerable ‘social strength’. For speakers, derogatory racial terms construct an ‘us’ versus ‘them’ reality, where the ‘them’ are cast as an unwanted outgroup. The consistent use of such terms establishes and normalises social hierarchies and the speech becomes licensed. In this sense, a racial slur has illocutionary force. Mark Richard adopts a similar approach. He defines a slur as a speech device made to ‘denigrate, abuse, intimidate, and show contempt, which is used to portray its targets in negative and oppressive light.’ He adds: ‘what makes a word a slur is that it is used to do certain things, that it has ... a certain illocutionary potential.’

According to Tirrell, there are five key features of deeply derogatory terms. These features are aligned with the illocutionary force of racist speech and enable an appreciation of why the Constitutional Court intuitively treated the ‘swartman’ descriptor in Rustenburg Platinum Mine

109 McGowan in Just Words (note 108 above) at 18–19 and 26–27 calls this mechanism a ‘conversational exercitive’. She explains that the term ‘exercitive’ was first used by Austin (note 10 above) to refer to a speech act that exercises ‘powers, rights, or influences’. McGowan has adapted the term to refer to an authoritative speech act that enacts harmful social norms. When such a speech act occurs as part of a conversation, it is a ‘conservational exercitive’.

110 McGowan Just Words (note 108 above) at 2.

111 McGowan claims that ordinary individuals are not ‘mere passive clogs’ in the social structure, but active participants in the extension of unequal social structures.

112 L Tirrell ‘Genocidal Language Games’ (2012) Speech and Harm: Controversies over Free Speech 174, 175. Swanson, another prominent scholar in this field, evades the authority problem by arguing that the use of a slur by person A encourages and emboldens others to consent to the use thereof and the entrenchment of the racial ideology associated therewith. See E Swanson ‘Slurs and Ideologies’ in A Volume on Ideology (2015) 16.

113 M Richard When Truth Gives Out (2008) 40. See too J Butler (note 106 above) at 80 who argues that when a person uses a racial slur, he or she ‘chimes in with a chorus of racists, producing at that moment the linguistic occasion for an imagined relation to an historically transmitted community of racists ... racist speech could not act as racist speech if it were not a citation of itself; only because we already know its force from its prior instances do we know it to be so offensive now, and we brace ourselves against its future invocations.’

114 Richard ibid at 1.

115 Tirrell (note 112 above) at 190.
not as a mere racial identifier, but as a type of racial epithet with illocutionary force (action engendering in Tirrell’s parlance), and one deserving of censure. Firstly, deeply derogatory terms act as markers of in-group/out-group status. Tirrell explains:

When speaker A uses a racial epithet to tell her friend B to stay away from a particular racial group of people, A sets up an insider/outsider relation, whereby A and B are not members of that group. They are insiders in their own presumed-to-be-better world, and they are outsiders to the badness of that racial group. Racist epithets of many sorts fit this pattern. ‘Nigger’, ‘spic’, ‘kike’, ‘mick’, ‘Jew’, ‘nyenzi’, ‘inzoka’, and many others seem to fit and are used accordingly.116

These types of epithets should thus be distinguished from belittling insults, such as ‘jerk’ or ‘slob’ or ‘idiot’. Whilst offensive, the latter type of name-calling is not linked to a person’s identity,117 and thus, according to Tirrell, should not be classed as deeply derogatory. A person could, for example, cease to be a slob or only behave like an idiot in specific situations. It is clear that ‘swartman’ fits the in/out dichotomy. It is highly unlikely, for example, that if the person parking next to Bester was a fellow white man, that Bester would have walked into the meeting and said, ‘remove that white man’s car’. Whilst I could be accused of conjecture, a more probable reaction may have been, ‘get rid of that idiot’s 4 x 4’, or alternatively Bester may have known his parking nemesis by name.

Secondly, deeply derogatory terms communicate negative messages based on the essential characteristics of the person targeted and, in so doing, enact and perpetuate social hierarchies.118 Tirrell calls this the essentialism condition — the purpose of the negative message is to depict group-based racial category differences, such as race, religion, ethnicity and gender, as being socially undesirable.119 A similar way of looking at this is to refer to the work of Eric Swanson,
who says that the use of the slur ‘cues the ideology’. Not only do racial slurs evoke past racist speech, they also evoke and endorse past racist actions and ideologies. Thus, racial names generate and perpetuate out-group prejudice and justify differential treatment. As explained below when discussing the social context and social embeddedness factors, I argue that in the South African context and with reference to the use of derogatory terms to refer to people of a different race under apartheid, the term ‘swartman’ satisfies this condition. It fits the mould of derogatory speech in the sense that it was employed to define Tlhomelang in racial terms and to convey essential differences between Bester and Tlhomelang. Certainly, Bester did not align himself positively with Tlhomelang, who was cast as someone from a different racial group.

Thirdly, in contexts where there are patterns of historical oppression and systemic racial discrimination, the racial slur in a speech act is more likely to take on an illocutionary force. Tirrell calls this the ‘social embeddedness condition’ and claims that in societies where there is entrenched racism, the racial term is at its most powerful, because it is used (either intentionally or sub-consciously) to demean, humiliate and dominate. She explains that: ‘[T]he mere word is not the issue; at work is the derogatory term, as used in a speech act (within a hurled epithet …) combined with both social embeddedness and essentialism.’ Swanson adds to the analysis. He explains that the use of racial slurs by persons belonging to dominant groups strengthens ideologies by emboldening speakers and listeners enabling them to enact the ideology depicted by the slur (even though this may occur unwittingly). In this way, the use of slurs contributes to the ‘power, persistence, and growth of the ideologies they cue.’

The social context factor assists with an understanding of why the utterance ‘swartman’, which on the face of it, appears to be a mere description of a person on the basis of race, was in fact derogatory and worthy of censure. It also provides a more substantive basis for the Constitutional Court’s finding that certain racial terms cannot be treated as ‘presumptively neutral’ and that the LAC’s approach ‘sanitised’ racism. Whilst the Court was correct to find that the LAC sanitised the use of ‘swartman’, its mistake was the inappropriate boxing of the social embeddedness condition underlying the use of derogatory racial terms within the framework of an objective test to determine the meaning of the word ‘swartman’. The meaning

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120 E Swanson ‘Slurs and Ideologies’ (note 112 above) at 11–12. Swanson also deals with the situation in which persons within the same group use slurs to degrade one another. He agrees that it is far more harmful when the speaker is from a dominant group.

121 Swanson ibid at 17–18.

122 See too the work of Gelber (note 55 above), aligning hate speech with systemic discrimination. She argues that we need to appreciate that the primary reason why we regulate hate speech is because of the harm it causes and that this involves an understanding of three key principles, namely the a) speaker’s authority or capacity to harm, b) a hearer’s vulnerability as a member of a systemically marginalised group, and c) the nature of the utterance. To identify hate speech, it is necessary to ascertain which groups may legitimately claim to be systemically marginalised. To this extent local context becomes even more important.

123 Tirrell (note 112 above) at 192.

124 Swanson (note 112 above) at 14. Interestingly Swanson explains further that ‘Unless the speaker has misjudged the speech situation, they will largely “get away” with using the slur, which gives them a reason to think that their use of the slur and the concomitant cueing of an ideology is permissible or at least unlikely to be sanctioned. This gives the speaker “a pro tanto reason to think that the ideology associated with the slur is justified”. Finally, such a speaker also inflames his or her own feelings of superiority and difference when using the slur, by emphasising the differences they see between themselves and their target — their perception, in the case of a racial slur, that “the subordinate race is intrinsically different and alien”.’ It is arguable that Bester used the term ‘swartman’ in this manner.

125 Rustenburg Platinum Mine (note 2 above) at para 48.
of the words used was clear — the Court did not need to use an objective test to determine the locutionary content of ‘swartman’. Moreover, a racial descriptor with reference to a person’s skin colour is not per se derogatory. The better approach therefore would have been to analyse the illocutionary force constituted by the ‘hurled’ utterance, which was far more significant than a racial descriptor, mainly because of its association with historical oppression.

The fourth feature of racial slurs is their capacity to serve a number of functions, depending on the context of use. Tirrell calls this the ‘functional variation’ feature. As we have seen, the main purpose of derogatory terms is the insider/outside defining function, but this is not their only purpose. They could also be used to label the behaviour of out-group people in a negative way, such as ‘gosh, person X is such a “swartman”’ (white colleague to black colleague about another black colleague), or ‘you’re behaving just like a “dutchman”’ (English speaking South African in a predominantly English urban area referring to an Afrikaans speaking person) or ‘Lucy is such a bimbo’ (male person to female person about another female person — Tirrell’s example). Here we have a speaker from a dominant group using third-person derogation to define acceptable/unaesthetic mannerisms or caricatures for people from an out-group in a way that ‘boomerangs from the target back to the hearer.’ In this way, the derogatory term is able to set suitable societal norms. What is critical to appreciate is that truly derogatory terms are able to serve multiple functions, depending on the context of the utterance. In my view, Bester’s use of ‘swartman’ to refer to Thlomelang served not only to describe Thlomelang skin colour, but also to portray and label him in a negative and subordinate manner as a nameless person from an out-group (from Bester’s perspective).

Finally, derogatory terms can be action-engendering to the extent that they define legitimate treatment or status-functions for the people so named — that is, where the use of the derogatory name depicts certain groups of people as lesser beings justifying their subordination. The classic example is the word ‘girl’ to refer to a woman or ‘boy’ to refer to an African man. The names ‘girl’ or ‘boy’ for children are perfectly acceptable, but when applied to adults the purpose is to assign a negative status or to rationalise paternalistic and patronising treatment, such as paying lower wages, or assigning certain work functions or undermining self-autonomy generally. The reality as Tirrell explains is that ‘Boys don’t have the same rights as men. Neither do girls. Assign the status, and the treatments follow.’ As to ‘swartman’, I argue that it was used in the context of the factual scenario in Rustenburg Platinum Mine to define the status of Thlomelang as someone who was subordinate to Bester and who occupied a diminutive social position.

In sum, derogations or slurs must be distinguished from mere insults, even though they share common features. The purpose of an insult is to hurt the target, potentially inflicting a ‘sudden sting’. Derogations, on the other hand, inflict long-lasting harm and result in the realignment of the target’s place in the world. Derogatory terms license discriminatory treatment and are subordinating. Applied to the facts in Rustenburg Platinum Mine and with reference to the South African context, it is my claim that the utterance ‘swartman’ served as

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126 Tirrell (note 112 above) at 192–193.
127 This example was provided by my Afrikaans-speaking husband. The term ‘Dutchman’ when used by an English-speaking South African person to refer to an Afrikaans-speaking person is invariably not complimentary.
128 A third-party derogation occurs when the speaker, who is a member of a dominant group, converses with a person from a subordinate group, and then uses a derogatory label to describe a third person, who shares the same group characteristics as the listener. See Tirrell (note 112) at 192.
129 Swanson uses this term. See (note 115 above) at 12.
130 Tirrell (note 112 above) at 193.
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a derogatory racial slur and as a speech act that was used to validate a social norm entrenching the previously enacted unequal status of black persons, even though this may have occurred unintentionally.131

V  THE SONG IN DUNCANMEC

Up until now, I have focused on the facts and judgment in Rustenburg Platinum Mine to illustrate that speech theory provides an enhanced means to assess the harm enacted by racial names. But, speech theory can also be applied to test the legitimacy of the struggle song which formed the basis of the enquiry in Duncanmec and helps to supplement the Court’s finding that the arbitrator’s decision was a reasonable one in the context of the facts of that case.132

In Duncanmec, the Court was concerned with the dismissal of nine employees who were found guilty of racially offensive conduct.133 The employees, who were union members, participated in an unprotected strike at the employer’s premises. They danced, sang struggle songs and refused to return to work when ordered to do so by their line manager.134 The lyrics of the offensive song were translated from the isiZulu to mean: ‘our mothers will rejoice when we hit the “boer”’ (with the employer cast as ‘boer’).135 The employees were charged with participating in an unprotected strike and gross misconduct, specifically singing racial songs and defying the instruction to return to work.136 At an in-house disciplinary hearing, the employees were found guilty on both charges and dismissed. The arbitrator disagreed with this finding. She viewed a recording of the incident and noted that the strike was peaceful and of short duration.137 Finding that a distinction should be drawn between using racial names and singing an apartheid-order struggle song, the arbitrator concluded that whilst the singing of the song was offensive and amounted to misconduct, the employees had not engaged in racist conduct. Their dismissal was thus substantively unfair, with the arbitrator awarding a written warning and reinstatement.138

The Constitutional Court was asked to consider whether the arbitrator’s decision was one that a reasonable decision-maker would have made. Counsel for Duncanmec argued that the arbitrator had not fulfilled her duties reasonably and that the song amounted to hate

131 Frantz Fanon Black Skin White Masks (1967) at 32 argues that the use of racial slurs or descriptors without intention to insult or degrade does not excuse the speaker. The lack of intention makes the situation worse. He says: ‘it is just this absence of wish, this lack of interest, this indifference, this automatic manner of classifying him, imprisoning him, primitivizing him, decivilizing him, that makes him angry.’ It is the social practice that is problematic, and which renders the words used more powerful, not the intention.

132 Duncanmec (note 4 above) para 51.

133 Ibid para 2.

134 Ibid para 10.

135 The Court held that whilst the song was offensive, the term ‘boer’ was not racially offensive. See Duncanmec (note 4 above) paras 37–39 and the discussion below. See too Afri-forum (note 5 above) paras 2–5 discussing the meaning of the term ‘boer’.

136 Duncanmec (note 4 above) para 11.

137 Ibid para 18.

138 Ibid paras 19–20. The compensation was limited to three months as a sign of the arbitrator’s disapproval of the conduct.
speech and racism.\textsuperscript{139} The employees should accordingly have been dismissed. NUMSA, the employees’ union, asserted that the singing of a struggle song, even one containing the lyrics in question, could not be equated with racism. Instead, struggle songs served the ‘purpose of marshalling the workers to stand together in “solidarity and defiance of the authority of the employer’” and should be treated as a ‘rallying call for workers to unite’.\textsuperscript{140}

In assessing whether the employees had engaged in racist conduct, the Constitutional Court held that the mere use of the term ‘boer’ did not constitute racism. Depending on the context of use, the word could mean ‘farmer’ or ‘white person’. These translations are not racially offensive.\textsuperscript{141} Nonetheless, the Court held that it was prepared to approach the matter on the basis that the employees were guilty of engaging in racially offensive behaviour (as opposed to ‘crude’ racism) for two reasons. Firstly, the arbitrator had decided that singing of the song was inappropriate and could cause hurt to those who heard it, and secondly, NUMSA had not objected to this finding.\textsuperscript{142} On the question of sanction, the Court confirmed that the arbitrator’s decision not to dismiss the employees was reasonable. The arbitrator had taken into account the context in which the song was sung (as set out above), the relationship between the employer and the employees, and the employees’ personal disciplinary records and circumstances.\textsuperscript{143} Moreover, according to the Court, Duncanmec’s argument that the arbitrator had permitted racism by failing to dismiss the employees was unfounded. They were not found guilty of racism and even if the singing of the song did amount to racist speech, our law does not require an automatic dismissal for the use of racist terms at work.\textsuperscript{144} Instead, each case must be assessed in light of its own particular circumstances and a balance struck between the imperative to treat racism firmly and the perpetrator fairly.\textsuperscript{145}

The Court’s evaluation of whether the song amounted to racially offensive speech lacked substance and analytical rigour. The Court struggled to distinguish between racially offensive behaviour and so-called crude racism in the workplace context. In my opinion, this happened because the Court did not engage sufficiently with the nature of the speech act in issue (a struggle song) and whether it had the capacity to enact harm in the circumstances at stake. An appreciation of speech theory, specifically the illocutionary force of a struggle song, would undoubtedly have enhanced its analysis. The Court’s judgment would also have benefited by juxtaposing the legitimacy of the song as sung in these circumstances with its earlier decision in \textit{Rustenburg Platinum Mine}, where the use of ‘swartman’ was held to constitute racist speech,\textsuperscript{139} Ibid para 32. Counsel for Duncanmec also argued, with reference to the minority judgment of Ngcobo J in \textit{Sidumo} (note 20 above) that the arbitrator had applied her own sense of fairness when deciding that the employees should not be dismissed. Moreover, her decision was ‘out of kilter’ with the prevailing jurisprudence requiring racism to be eliminated from the workplace.

\textsuperscript{140} \textit{Duncanmec} (note 4 above) para 25

\textsuperscript{141} Ibid para 37

\textsuperscript{142} Ibid paras 37–39.

\textsuperscript{143} Ibid para 51.

\textsuperscript{144} Ibid para 48, with reference to \textit{South African Revenue Service} (note 8 above) para 43.

\textsuperscript{145} \textit{Duncanmec} (note 4 above) paras 48–49.
and the decision in *Afri-forum and Another v Malema and Others (Afri-forum)*, where a struggle song containing similar lyrics was held to constitute hate speech.

The illocutionary force of the song as sung in *Duncanmec* carries significantly less weight than the racial epithet in *Rustenburg Platinum Mine*. There are a number of marked differences between the two speech acts and the circumstances involved. Firstly, the speakers in *Duncanmec* were a small group of employees who occupied a lowly position in the workforce and who were involved in strike and protest action against their employer. Secondly, the societal context and the history of oppression in the two cases are not comparable. Thus, the hierarchy and power relations between the actors involved are distinguishable. In particular, it is highly unlikely that the employees in *Duncanmec* had the authority to subordinate or demean the employer, the ‘target’ of the song. Thirdly, the utterance in *Rustenburg Platinum Mine* took the form of a hurled racial name as a slur, and the tone used was pejorative and insulting, whereas *Duncanmec* concerned a traditional struggle song used to protest against oppression. Whilst musical communications in the form of song can certainly constitute hate speech, the illocutionary force of the song in question must be assessed with reference, not only to its historical significance, but also to its purpose as a current-day protest song used by a subordinate group to express and consolidate their dissatisfaction with the status quo of many workplaces in South Africa. Accordingly, although the Constitutional Court arrived at the correct outcome in *Duncanmec*, its judgment would have been normatively richer had it included an analysis of the illocutionary force of the song to assess whether the song had the capacity to enact harmful norms in the form of racial subordination. I argue that it did not invoke such force — particularly in the circumstances at play in *Duncanmec*.

Finally, and whilst the Court in *Duncanmec* acknowledged (in passing) that the circumstances of the singing of the protest song by the workers in issue was not comparable to the facts in *Afri-forum*, speech theory would also have enabled the Court to explain the

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146 *Afri-forum* (note 5 above). Here the Equality Court was asked to determine if the song amounted to hate speech in terms of s 10(1) of the Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000. This section was recently declared unconstitutional as being overbroad by the Supreme Court of Appeal in *Qwelane v South African Human Rights Commission & Another* [2019] ZASCA 167, 2020 (2) SA 124 (SCA). The matter was set down for hearing before the Constitutional Court on 7 May 2020, but was postponed because of the lockdown imposed as a result of the COVID-19 pandemic. See too J Botha ‘Of Semi-Colons and the Interpretation of the Hate Speech Definition in the Equality Act: *South African Human Rights Commission v Qwelane (Freedom of Expression Institute as Amici curiae) and a related matter* [2017] 4 All SA 234 (GJ)’ (2018) 39 Obiter 526 for an analysis of the earlier Equality Court judgment.

147 See too *Freedom Front v South African Human Rights Commission* 2003 (11) BCLR 1283 (SAHRC), where the slogan used was tested against the definition of hate speech in s 16(2)(c) of the Constitution.

148 It is acknowledged that the power dynamics would be different if the workers were in the majority and if the protest was not a peaceful one, with a sense of threat involved.

149 From a South African perspective, the decisions in *Freedom Front* (note 147 above) and *Afri-forum* (note 5 above) are obvious examples. See too BA Messner, A Jipson, PJ Becker and B Byers ‘The Hardest Hate: A Sociological Analysis of Country Hate Music’ (2007) *Popular Music and Society* 30 for an interesting analysis of the history of protest songs and songs as hate speech.


151 *Duncanmec* (note 4 above) para 27, with reference to the LC judgment at paras 78–80.
distinction between the outcomes reached in *Duncanmec* and *Afri-forum*. In *Afri-forum* the Equality Court held that the singing and chanting of a struggle song containing the lyrics ‘shoot the Boer’ and ‘they are scared the cowards; you should shoot the boer; they rob these dogs’, coupled with threatening gestures, by a political leader on a number of separate occasions (all political platforms, barring a birthday party) amounted to hate speech. The circumstances surrounding the singing of the struggle song in *Afri-forum* engendered it with an illocutionary force significantly more powerful and harmful than the singing of the song on the facts in *Duncanmec*. The speaker in *Afri-forum* had authority as a political leader (the then leader of the ANC Youth League); the song was sung at political rallies as a means to rouse up the audience; the singing of the song was not a once-off incident — on the facts, it had been used in at least three separate political gatherings; the singing was accompanied by aggressive gestures; and the lyrics actually used were more far threatening than those in the song sung by the workers in *Duncanmec*. Had the *Duncanmec* Court engaged more proactively with the hierarchal and power relationship between the actors involved in *Duncanmec* and compared the authority of the striking employees to that of the speaker in *Afri-forum*, the Court’s judgment would have been more convincing, both substantively and as a means to enlighten the public on the limits of free speech. In short, the Court would have done far better had it addressed the intricacies of the racist speech problem head-on and examined the potential of a struggle song containing racist lyrics to enact harm.

**VI CONCLUSION**

I have argued that the harm of racist speech should be assessed not with reference to the meaning of the words used or by tallying and weighing the harm it causes. The better approach is to view racist speech as a subordinating and oppressive speech act, with illocutionary force, where the speaker enacts harm through the words used. Racist speech in the form of racial names is particularly dangerous, because such speech perpetuates structural inequality and oppression and deprives its targets of their status in society. This understanding of the power of racist speech demonstrates that it has the capacity to normalise inter-group hatred, to categorise people as inferior, to enforce othering and to keep intact a shared understanding of social hierarchies and relationships. It is thus a mistake to view a term such as ‘swartman’...

152 In this article, I do not critique the judgment in *Afri-forum* (note 5 above). My intention is merely to juxtapose the singing of the *Duncanmec* song with the circumstances in *Afri-forum* to illustrate the distinction in illocutionary force.
153 *Afri-forum* (note 5 above) at para 52.
154 Ibid at para 50.
155 Ibid at paras 49, 67 and 86–89.
156 Ibid at paras 49, 67. The incidents were widely reported in the press thereafter and resulted in a public outcry — see paras 68–75, 81
157 Ibid at para 56.
158 See the analysis of M Du Plessis ‘Between Apology and Utopia — The Constitutional Court and Public Opinion’ (2002) 18 *South African Journal of Human Rights* 1 who reiterates that an apex court must be prepared to deal with difficult moral cases by using substantive judicial reasoning. He argued that for the Court to be capable of enlightening members of the (dissenting) public of the role expected of them as citizens of a constitutional democracy, the Court must engage proactively with the issues at stake by employing substantive jurisprudential reasoning.
159 I acknowledge that if the social context changes, the capacity to harm is not static, and new targets could be constructed.
as an innocent racial descriptor, especially in the context in which the utterance occurred in \textit{Rustenburg Platinum Mine}.

The words of MacKinnon are particularly apt. She says: ‘Words and images are how people are placed in hierarchies, how social stratification is made to seem inevitable and right, how feelings of inferiority and superiority are engendered, and how indifference to violence against those on the bottom is rationalized and normalized.’ Applied to the belligerent and pejorative use of ‘swartman’ in the South African work context, it is clear that the term has the capacity to enact harm, to subordinate and rank, and to perpetuate racist attitudes and inequality, regardless of the lack of intent on the speaker’s part.

Thus, although the Constitutional Court in \textit{Rustenburg Platinum Mine} reached the correct outcome, namely that the speech was worthy of censure, the Court’s substantive reasoning would have been enriched by utilising speech theory to examine the illocutionary force of the term ‘swartman’ when used by a white man to refer to a black man. An understanding of the capacity of speech to enact harm through subordination enables an appreciation of the power of speech, which is not limited merely to testing the meaning of the words employed (the locutionary content) and the harm that speech causes (the perlocutionary effects). The point is reinforced when regard is had to the distinction between the speech used in \textit{Rustenburg Platinum Mine} and the ‘struggle song’ in \textit{Duncanmec}. The latter song, when understood properly in its context, did not have ‘ranking’ power or the ability to enact subordination and identity-based oppression.

Whilst the Court was not asked to test the constitutional legitimacy of the speech acts in either \textit{Rustenburg Platinum Mine} or \textit{Duncanmec}, or to assess whether a law restricting freedom of expression should be constitutionally permissible, there is no doubt that a conceptualisation of the illocutionary harm of racist speech enables a finer appreciation of the harm constituted by such speech. This is true not only for cases with facts and issues similar to those in \textit{Rustenburg Platinum Mine} and \textit{Duncanmec}, but also for the more complex cases where the Court is asked to engage in a constitutional review of legislation which censors freedom of expression. Here, a better understanding of the illocutionary force of speech and its capacity to enact subordination and identity-oppression enhances the inevitable balancing exercise in which the Court will be required to weigh the benefits of the promotion of free speech against the need to regulate and censor harmful speech.

\footnote{160} MacKinnon \textit{Only Words} (note 80 above) at 31.

\footnote{161} See \textit{SA Human Rights Commission v Qwelane} (forthcoming), a challenge to the overbreadth of the hate speech prohibition in \text{10}(1) of the Equality Act (note 146 above).
Where Is Property? Some Thoughts on the Theoretical Implications of Daniels v Scribante

ZSA-ZSA BOGGENPOEL & BRADLEY SLADE

ABSTRACT: The theoretical implications of the Constitutional Court’s decision in Daniels v Scribante are analysed in this article. With reference to Jane Baron’s theory of the contested commitments of property, it considers the place of property, or ownership, in resolving property disputes in the new constitutional dispensation. The starting point of a dispute involving property is important in the sense that it may determine the potential outcome, or remedy that is awarded, in any particular dispute. Placing property at the centre, or at the heart of any dispute that may involve property, can in certain circumstances go against the constitutional aspirations of healing the divisions of the past and building a society based on fundamental values, such as human dignity. With reference to the arguments of progressive theorists, it is argued that the Constitutional Court in Daniels placed property on the fringes; indicating that property owners may have to sacrifice more in protecting the rights of non-owners. Therefore, the Daniels decision is an important decision for our evolving understanding of the place of property in democratic South Africa.

KEYWORDS: property theory, constitutional law, evolving understanding of property

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I INTRODUCTION

Jane Baron contrasts two stories that define the work of various theorists who think about the role of property law in society.\(^1\) She explains that the first proposition arises from the approach of information theorists\(^2\) who contend that our property law system is slow to change. In Baron’s words, the view of information theorists can be explained as follows:

> Our property system … has existed for a very long time, so long that we have not really noticed it. While it may seem restricting, it advances freedom. The limited forms the system permits can be combined in a wide variety of ways to achieve almost any desired end. The system has not changed much, and it does not need to change much. This is why legislative reforms are superior to judicial reforms: when we need them, as with condos and time-shares, we will get them, but otherwise change will largely be rationed, ensuring that the system will be largely stable.\(^3\)

In contrast, progressive theorists\(^4\) depict a system that changes continuously as follows:

> [P]roperty has changed over time, and it will (and should) continue to change. It has always limited owners’ freedom to protect the interests of others, and there is nothing wrong with that, for human flourishing, virtue, freedom, and the like require sacrifice. Legislative change is good, but so are judicial changes. The only important question is whether we have the right quality of social relations, and if we do not, then property rights must be adjusted.\(^5\)

These narratives, which Baron describes as ‘commitments’ depict different (and indeed contested) ideas about the role that property law plays in organising human behaviour and social life. Baron concludes that ‘[s]ince we care about how property works, we need to attend to these contested commitments and the choices they require us to make.’\(^6\) The underlying tension about how property law works in the process of ordering social relationships to a large extent informs the way we choose to protect property rights — or, stated differently, the remedies used to protect rights in property. The descriptive point encapsulated in this tension is that where you begin inevitably determines the outcome you will achieve. It is interesting to think about whether the push-pull effects of these contested commitments to property are valuable in understanding why litigants choose (and why courts grant) certain remedies in any given situation. The aim of this article is to shed some light on the question of whether the contested commitments to property law as indicated by Jane Baron can be used to explain the outcome of the Constitutional Court’s decision in Daniels v Scribante and Another, which concerned the question whether an occupier is entitled to effect improvements to property to ensure habitability with dignity, even in the case where the owner refuses to give permission for such improvements.\(^7\) In a very real sense, Daniels shows that the contested commitments to the role of property law can essentially determine the outcome in a particular case. It was clear from the Daniels decision that the Court was not wholly focussed on placing ‘property’ or ‘ownership’ at the heart of the decision of whether Ms Daniels could affect improvements to the occupied property. If the decision had been primarily about property in circumstances in which a discussion of ownership had been allowed to dominate the question about the

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2. For a discussion of a theory of property based on the need for information, see Baron ibid at 924–927.
3. Ibid at 960–961.
4. For a discussion of progressive theories of property, see ibid at 927–932.
5. Ibid at 961.
6. Ibid at 966.
7. (CCT50/16) [2017] ZACC 13, 2017 (4) SA 341 (CC) (‘Daniels’).
limits of what an occupier can do in relation to the owner’s property, the outcome of the case may have been completely different. Consequently, the case is an embodiment of a particular theoretical approach to property law, one which places property law at the fringes where values such as human dignity are at stake. This clearly indicates a tendency towards favouring the ideals advanced by progressive theorists, which will be the focus throughout the paper.

Although the judgment deals with a number of aspects broader than private property law, such as constitutional law, constitutional property law and land reform, the decision is also important from a private property law perspective and deserves further discussion in this regard. Very importantly, the decision brings to the fore a really important aspect crucial to the understanding of property law in the new constitutional dispensation, namely the fact that the nature and concept of ownership of property must be understood and explained within a historical context that requires ‘honest and deep recognition of past injustice[s]’ and a deep sense of acceptance of the mandate for constitutional change. No doubt discussions of this judgment will still make their appearances in law journals by academic authors focussing on the implications of the decision on many different areas of the law. Our particular interest in the Daniels judgment is that it marks an important turning point for the discussion about post-apartheid property law. Albeit that the question that we would like to address in this article is a modest one, it is complex. Where is property in light of the Daniels decision? More specifically, what does the Daniels decision tell us about the place of property law in the new constitutional dispensation, and do the contested commitments to property (as initially advanced by Baron) inform the outcome in this particular judgment? In this regard, a number of theoretical perspectives are put forward to show the importance of reflecting on the appropriate starting point when engaging with property disputes in the constitutional era.

On a theoretical level, the judgment (especially Froneman J’s judgment) certainly forces one to engage with a number of important questions about the nature and concept of ownership within a particular legal system in light of the constitutional mandate to heal the divisions of the past, and to establish a society based on human dignity, equality and freedom. The case highlights pertinently that the essence of ownership, in the sense of what an owner can (or cannot do) in relation to property, is challenged if one of these aforementioned rights or values is at stake. In this regard, it is important to take cognisance of the starting points from which one begins to resolve disputes of this nature. The contested commitments to property law become valuable in understanding why courts reach the decisions they do. It is also important to begin finding theoretical frameworks that help guide theorists in reconceptualising a vocabulary for

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8 Ibid at para 115 in Froneman J’s judgment.
9 See for instance IM Rautenbach ‘Sosiale Rege en Private Pligte — Huisvesting op Plase’ (2017) 14 Litnet Akademies (focussing on the positive obligations of landowners); EJ Marais & G Muller ‘The Right of an ESTA Occupier to Make Improvements without an Owner’s Permission after Daniels: Quo vadis Statutory Interpretation and Development of the Common Law’ (2018) 135 South African Law Journal (suggesting that an expanded understanding of the categories of lawful occupiers permitted to make improvements without the owner’s consent would have been more appropriate); D Davis ‘The Right of an ESTA Occupier to Make Improvements without an Owner’s Permission after Daniels: A Different Perspective’ (2019) 136 South African Law Journal. In this respect, it should be noted that the case potentially raises ancillary questions about the remedial choice between striking ESTA down; or providing an alternative remedy in the particular case. Marais & Muller, for instance suggest that the common law of unjustified enrichment (as developed) could have provided an alternative remedy to Ms Daniels. However, as Davis rightfully points out, the remedy will essentially depend on how the case is brought. Davis (2019) (this note above) at 431–432.
10 See Preamble and s 1 of the Constitution of South Africa, 1996.
property law under the current constitutional dispensation, and the Daniels decision presents an opportunity to start thinking about what such a new vocabulary might entail.

With this background in mind, Part II of this article begins the quest for finding a new theoretical framework by unpacking the idea of the contested commitments to property law and locating the information theorists and progressive theorists at two (presumably opposite) ends of a continuum. We do this with the aim of determining whether this can provide insights into the Daniels decision. Part III will follow with an in-depth exposition of the facts of Daniels in order to show how the outcome of this judgment could only have been achieved with due appreciation for the particular starting point from which the judgment began. In this third part of the article, we also provide some thoughts on the impact of the decision on the presumptive power of property that has dominated the discussion around ownership of property in the past.11 These thoughts about power of property will provide a platform for our argument about the theoretical implications of the Daniels judgment, which we will discuss in Part IV of the article.

Pierre de Vos sees the Daniels judgment as forcing us to think about property more in terms of relationships, rather than in exclusionary terms — the latter of which focuses on exclusion as the most important characteristic of property.12 In this respect, the judgment potentially underscores the importance of understanding the fact that the specific theoretical point of departure (or starting point) essentially determines the outcome or remedy in a particular case. This starting point needs to be evaluated from various theoretical perspectives regarding the nature, meaning and role of property and property law in society. In this reason, Jane Baron’s contrast between information and progressive theorists provides an appropriate way of thinking about property law, especially in light of the question of where the outcome in Daniels can be plotted in the context of this continuum. The discussions about the relational (or shared) nature of property, as advanced by Rashmi Dyal-Chand in her arguments in favour of Property sharing, provide another interesting theoretical perspective to the conclusions in Daniels.13 What is clear is that a different approach to property — an approach that recognises property on the fringes of society in instances where other non-property (constitutional) rights are at stake — may be the appropriate theoretical framework for understanding property law in a transformative constitutional setting. This insight is made by relying on the seminal contributions of Joseph William Singer in The Edges of the Field14 and the late André van der Walt in Property in the Margins15 (and his later refinement of the arguments developed in that book, in an article entitled The Modest Systemic Status of Property Rights).16 We use these theoretical points of departure to start engaging with the outcome in Daniels, especially

11 The authors are of the view that the presumptive power of property — that essentially favours ownership as the apex right — still dominates property law thinking. The arguments made by the owner in the Daniels case are arguably evidence of exactly this thinking. However, the authors do acknowledge the strides that have already been made in recognising rights that are worthy of protection even in contradiction to ownership. A noteworthy example in this respect would be the denial of the owner’s right to evict if it would not be just and equitable to grant an eviction order.
14 J Singer The Edges of the Field (2000).
15 AJ van der Walt Property in the Margins (2009).
the question of how a particular theoretical vantage point determines a particular outcome. Thereafter, the final section of the article, part V, will discuss more conclusively why it is important, in light of Daniels,\textsuperscript{17} to reflect on the starting points when it comes to vindicating property rights, and how this impacts on the outcome or the remedy that is awarded. Arguably, reflecting on a particular starting point may open up possibilities to reconceptualise property relations and provide a richer, more nuanced vocabulary, and ultimately assist in creating a more equal distribution of property rights in society.

II THE CONTESTED COMMITMENTS TO PROPERTY

Jane Baron presents two schools of thought about property law. One difference between the theories is that ‘[i]n one view, property is already working well enough as a social ordering device; [and] in the other, the quality of the existing social order must be continually and directly challenged.’\textsuperscript{18} This section will discuss some of the basic tenets of each theory with the hope of determining whether these contested commitments to property law offer some guidance on the theoretical implications of the Daniels decision.

Information theorists are focused on standardised signals that indicate inclusion and exclusion.\textsuperscript{19} These signals create a clear, relatively simple property system that provides indicators to all around about how to behave in respect of the property of another. The premise behind information theory is that property law needs to communicate information to others and it consequently indicates to potential violators what they may and may not do in relation to property. The system needs to be clear and simple, by recognising a small number of standardised forms of property in which rights are subject to revision only by agreement.\textsuperscript{20} In terms of this theoretical vantage point, property law (and by implication its remedial options) is essentially formalistic and has clear boundaries.

\textsuperscript{17} Part V below.

\textsuperscript{18} Baron (note 1 above) at 923.


For progressive theorists, property law has the capacity to promote a number of values, and the basis for property law underlies the values that property potentially serves. If one focuses on only what the law is, one will fail to account for the underlying networks of social relationships that work to create and sustain the law. It is on this basis that Laura Underkuffler explains that ‘[s]ingle-minded focus on “what the law is” will miss the underlying networks of social relations that work to create and sustain that law’.

Progressive theorists therefore suggest that we must be provoked to question — and perhaps subvert — the presumed neutrality and acontextuality of the law by incorporating certain values. Although different progressive theorists focus on different values, the basic premise of the movement remains the same. Gregory Alexander contends that the basic tenet is the flourishing of humanity; while Eduardo Peñalver draws on human flourishing, but focuses specifically on a virtue theory of land use. Joseph Singer suggests a democratic model of property law, and Underkuffler has unpacked Sarah Keenan’s notion of subversive property as a means to unsettle the seemingly neutral nature of property law. Jedediah Purdy’s work in relation to freedom and property could also fit in with the ideals of the movement, and interestingly, Rashmi Dyal-Chand argues that if the focus in property disputes is more on outcomes than on exclusion; and property law may have the potential to address acute problems of fairness and distributive justice to a much greater extent than it currently does. All these authors would agree that property law has the capacity to promote a number of values, and all these theorists submit that although the right to exclude is intuitively appealing as a foundational core of property law, the institution of property law should be more concerned with (re)constructing social relations.

21 For the moment we mention only the academic authors who have explicitly associated themselves with this movement in the Progressive Property Statement and further authors specifically mentioned in the article, although there have been a number of authors who have in the meantime either explicitly or implicitly associated themselves with the ideals of the movement. The initial signatories to the Progressive Property Statement were GS Alexander, EM Peñalver, JW Singer and LS Underkuffler. Jane Baron includes Jedediah Purdy as part of the movement for his work in relation to freedom and property, which according to Baron fits in with the ideals of the movement. The group of Progressive Property scholars who meet each year seems to have changed since the initial statement was signed and therefore it is difficult to incorporate an extensive discussion of how the movement has evolved over the years. This section focuses on establishing the basic premise of the movement (especially in light of the founders of the movement and their work in advancing the ideals of the movement). We do however posit the work of Rashmi Dyal-Chand, especially her interest-outcome model on the basis of sharing, as an example of another author whose work fits in with the ideals of the Progressive Property movement, albeit not expressly.


28 Dyal-Chand (note 13 above) at 647.

property law aims to resolve disputes, and it certainly cannot form the basis for designing a property institution.

In the end, information theorists and progressive theorists use different metaphors to represent their commitments. Information theorists, on the one hand, employ the metaphor of the machine. Property law is seen as a machine that has produced a good-enough social ordering and information theorists are interested in how the machine works. For progressive theorists, on the other hand, property is seen as a conversation, which involves continual questioning about whether the property law system is in fact good enough.

These contested theories depict very different ideas of the role that property law plays in organising human behaviour and social life. It is clear that each theoretical vantage point can have an impact on the remedies that the legal system adopts to maintain its property regime. The push-pull effects of these contested commitments to property are certainly valuable in understanding why certain remedies are granted in any given situation. Laura Underkuffler makes the same point when she shows that the conception of property one chooses will have a determinative outcome on whether individual property claims win or lose when confronted with conflicting public interests.30 For that realisation it is necessary to take a step back and see the bigger picture. Daniels presents an interesting example of the correlation between the theoretical vantage point, or the point from which one begins as shown by Baron, and the remedial response to that theoretical vantage point. But, only if you really look. It is not self-evident, but it is there. If Daniels had, for instance, been made out to be a case of ownership and exclusion (in line with the emphasis placed by information theorists), instead of interpreting the provisions of ESTA in line with the Constitution (and the extent to which that interpretation impacts on the reordering of the social relations between the owner and the vulnerable occupier, which is very much in tune with progressive scholarship), the outcome may have been very different. In the sections that follow, we will attempt to unravel what can be deduced from the outcome in Daniels. In order to do that, it is firstly necessary to set out the facts of the decision briefly.

III A SYNOPSIS OF DANIELS V SCRIBANTE

Daniels v Scribante concerns an occupier’s right to make improvements under the Extension of Security of Tenure Act 62 of 1997 (ESTA). The decision consists of a majority judgment written by Madlanga J. Froneman J, Cameron J, Jafta J and Zondo J concurred with the finding of the first judgment, although each of the justices wrote separate judgments. Each of the judgments will be discussed to the extent that they provide some insight into understanding property in the post-apartheid constitutional dispensation, and very importantly, whether the different judgments provide indications of underlying contested commitments to property.

The case dealt with an application by Ms Daniels, an ‘occupier’ in terms of ESTA, to effect certain improvements to the property in which she and her three minor children lived. The dwelling was owned by the second respondent, Chardonne Properties CC, and the farm was managed by the first respondent, Mr Scribante. Mr Scribante was classified as the ‘person in charge of land’ for purposes of s 1 of ESTA, and was therefore the person who, at all relevant

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30 Underkuffler (2003) (note 26 above) at 5. She also mentions that ‘the conception of property one chooses can influence our awareness of property’s social context, our idealized notions of the relationship between the individual and collective life.’
times, was able to provide the necessary consent for the improvements to be effected to the dwelling. Such consent was, however, explicitly denied by Mr Scribante.

The applicant had lived on the farm for sixteen years with her three minor children. The first respondent had neglected to maintain the dwelling in which the applicant resided and she had previously approached the Stellenbosch Magistrate’s Court for a declaratory order to force the respondent to maintain the house. That order was granted by the court and the first respondent had complied with the order. The improvements effected in terms of that order were purely for maintenance-orientated purposes and the applicant sought to effect certain (further) improvements to make the dwelling more habitable. These included levelling the floors, establishing an in-house system of running water with a basin, another window in the house, and paving parts of the surrounding areas of the house. Both parties were in agreement that the improvements that the applicant sought to effect in terms of the present application were not luxurious, but were basic human amenities. It was therefore accepted that the current dwelling would not accord with the standard of human dignity as required by the Constitution. Although Ms Daniels was willing to pay for the improvements herself, the first respondent refused to grant consent for the further improvements to be made. When the applicant subsequently began effecting the improvements, the respondents demanded that the building work cease since they had not given consent for the improvements to be made.

Ms Daniels approached the Stellenbosch Magistrate’s Court for an order declaring that she was entitled to make the improvements. She relied on certain provisions of ESTA, specifically ss 5, 6 and 13 of the Act, to argue that the right to make improvements to the property is included under the right to reside in terms of ESTA. Her application was unsuccessful in the Stellenbosch Magistrate’s Court. In the absence of a clear provision in ESTA that provides for a right to make the improvements, Ms Daniels was also unable to convince the Land Claims Court that she had such a right. Both the Land Claims Court and the Supreme Court of Appeal denied leave to appeal and, consequently, she sought leave to appeal to the Constitutional Court. The Constitutional Court granted leave to appeal on the basis that it would be in the interest of justice to hear the appeal since the matter raised important constitutional issues. The pertinent question before the Constitutional Court was whether Ms Daniels was entitled to make the requested improvements without the owner’s consent so that she could reside in a dwelling that complied with the standard of human dignity required by the Constitution.

Madlanga J, writing the majority judgment, began by questioning whether ESTA provides for a right to effect improvements on the land of another. In this regard, the Court provided a lengthy discussion of the actual wording of ESTA, but, more importantly, the historical context that gave rise to the need for the enactment of this piece of legislation. The Court set out this historical perspective in order to provide the context to establish whether the occupier’s right to reside under ESTA included the right to make improvements to the dwelling. Crucially, the respondents asserted that the actual wording of s 6 of ESTA does not explicitly (and actually) provide for a right to effect improvements. In this regard, the Court conceded that ‘it is so that

51 The order in the Stellenbosch Magistrate’s Court was specifically for the repair and maintenance of the roof and electricity supply. Daniels (note 7 above) at para 6.
52 Ibid at para 7.
53 Ibid.
54 Ibid at para 12. The Court mentioned ss 25(6) and 26 of the Constitution as being the provisions implicated in this regard.
s 6 has no provision that explicitly says an occupier has a right to make improvements meant to bring her or his dwelling to a standard suitable for human habitation’. Madlanga J sought to determine whether the right under s 6 of ESTA could nonetheless be interpreted to include a right to make improvements even if the section did not explicitly mention it.

Madlanga J stressed that the provision in question should not be read too narrowly. The context sketched by the Court earlier in terms of the purpose of ESTA was specifically done to emphasise that occupiers enjoy fundamental rights, including human dignity. Madlanga J, in fact, recognised that the two constitutional rights implicated in this judgment were the right to security of tenure (in s 25(6)) and the right to human dignity (in s 10). If an interpretation of s 6 of ESTA in line with the suggestion of the first respondent were to be adopted, it would mean that the provision would allow for a right that is devoid of substance, and which would infringe on s 5 of ESTA. In this regard, the Court mentioned that it was questionable whether an occupier who lives in a dwelling that is in a deplorable state could be said to ‘reside’ in that property. The Court refused to accept such an interpretation of the provision and concluded that like ‘the notion of “reside”, security of tenure must mean that the dwelling has to be habitable’. If this meant that improvements were necessary to reach a certain level of habitability were required, the Court was willing to accept that the provisions of ESTA allowed for that. Therefore, the right to effect improvements actually stems from a purposive interpretation of ESTA and therefore no issues of separation of powers are implicated if a court orders that such improvements may or should in fact be made where the legislation does not explicitly provide for it.

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36 Ibid at para 27.
37 Ibid at paras 13–23.
38 Ibid at para 25. Human dignity is both a value (ss 1, 7(1), 36, 39 of the Constitution) and an entrenched human right in s 10 of the Constitution. In Dawood & Another v Minister of Home Affairs & Others; Shalabi & Another v Minister of Home Affairs & Others; Thomas & Another v Minister of Home Affairs & Others (CCT35/99) [2000] ZACC 8, 2000 (3) SA 936 (CC) (‘Dawood’) at para 35, the Constitutional Court stated that human dignity is ‘a value that informs the interpretation of many, possibly all, other rights.’ In Dawood, O’Regan showed how human dignity as a right has a residual (or secondary) role to play in cases where a breach of a more specific right, such as the right not to be subjected to slavery, has been breached. O’Regan argued that it is only where no other specific right in the Bill of Rights is applicable, that reliance on the right to human dignity would be appropriate. However, as H Botha ‘Human Dignity in Comparative Perspective’ 2009 (20) Stellenbosch Law Review 198 points out, the Court has ‘not been entirely consistent’ in its approach. For instance, in the subsequent decision of Teddy Bear Clinic for Abused Children & Another v Minister of Justice and Constitutional Development & Another (CCT 12/13) [2013] ZACC 35, 2014 (2) SA 168 (CC) Kampepe J found that the impugned legislation constituted a violation of the right to human dignity (at para 58), as well as the right to privacy (at para 64) and the best interest of the child (at para 79). Although Madlanga J in the Daniels decision referred to both the right to security of tenure and the right to human dignity, it appears that the right to security of tenure was in the end the primary right upon which this decision was based, and that human dignity informed the understanding of that right. A similar position to that of Madlanga J in Daniels was adopted by the Constitutional Court in Khosa & Others v Minister of Social Development & Others, Mabola & Another v Minister of Social Development (CCT 13/03, CCT 12/03) [2004] ZACC 11, 2004 (6) SA 505 (CC). See H Botha ‘Human Dignity in Comparative Perspective’ 2009 (20) Stellenbosch Law Review 171; A Barak Human Dignity (2015) 243–279.
39 Daniels (note 7 above) at para 32 (footnotes omitted from original text).
40 Ibid at paras 33–36. The respondents also argued that if the Court allows the applicant to make certain improvements to the dwelling, such an order would indirectly amount to the placing of a positive obligation on the owner (as a private person) to ensure that the rights in the Bill of Rights (specifically s 25(6) in this case) are given effect to. The Court dealt with this issue in paras 37–58.
41 Ibid at paras 51–57.
The Court proceeded to question whether the consent of the owner was required to effect the improvements, and concluded that the owner’s consent was not a prerequisite for the making of such improvements. Although the consent of owner, or person in charge, was not required to make the improvements, the Court reiterated that the owner could not be completely disregarded in the process of making the improvements. Meaningful engagement was required between the owner or person in charge and the occupier to help balance out the conflicting interests. If problems were to arise during the process of meaningful engagement, a court order would be required to resolve the dispute. In the end, the Court concluded that the applicant was entitled to effect certain improvements to the property and made specific reference to aspects that would have to be resolved during the meaningful engagement stage.

Froneman J, who wrote a concurring judgment in English and Afrikaans, explained that this case highlighted the fact that South Africa has a long way to go before the ideals of the Constitution are realised. The improvements Ms Daniels sought to effect in this case were, as Froneman J stated, ‘basic things’. In this regard, Froneman J emphasised that ‘[t]here is no reason to continue countenancing the continuation of inhuman and undignified living on farms any more’ because there is a constitutional mandate to heal the divisions of the past. Very concretely, this requires that ‘where the privileged among us are used to reasonable housing, access to water, and electricity, there is no justification for denying it to others who do not yet have it’. This requires reconceptualising a different idea of ownership of property.

The respondent’s point of departure as far as this matter was concerned pivoted, according to Froneman J, on the absolutist idea of ownership of property, one that cannot fully be sustained in the South African context. Such a viewpoint is often used to avoid the consequences of constitutional values and therefore Froneman J attempted to debunk the absolutist notion of ownership. He did so by placing the particular context within which such a notion was appropriate, namely within a particular period in the history of Europe. This way of thinking of ownership ultimately endorses a hierarchical approach in property law, where ownership is seen as the pinnacle of all rights, and all other rights are subordinate to ownership. Froneman J then proceeded to highlight why such an approach to (or conception of) ownership is not feasible under the Constitution with reference to the seminal case of *Port Elizabeth Municipality v Various Occupiers*. In *Port Elizabeth Municipality*, the Court stressed the specific role that courts play in ensuring that opposing claims are balanced out in a just manner, based on the interests involved in the specific case and the facts present in the particular matter. The point is that ownership has a social dimension to it — what Froneman J called the ‘social boundedness of property’ — that cannot be ignored. For this point of view Froneman J relied on the work of André van der Walt to show that absolutism of property and hierarchy of rights in effect

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42 Ibid at para 60.
43 Ibid at para 62. In para 64, the Court explained why meaningful engagement in this context was important.
44 Ibid at para 71.
46 Ibid at para 132.
47 Ibid at para 132.
48 (CCT 53/03) [2004] ZACC 7, 2005 (1) SA 217 (CC) (‘*Port Elizabeth Municipality*’).
49 Daniels (note 7 above) at para 135.
perpetuate existing inequalities to the extent that they stand in the way of transformation.\textsuperscript{50} This requires rectifying historical injustices, but also looking forward to ensure that occupiers are able to live a dignified life irrespective of the race of the particular occupier or the owner.

Froneman J pointed out that Madlanga J’s judgment in essence shows that the protection of ownership cannot be accepted without recognising the injustices of the past. An ahistorical explanation of ownership devoid of recognition of historical injustice cannot be supported because that would entrench the inhumane indignity with which Ms Daniels had had to live over the past sixteen years.\textsuperscript{51} Froneman J was also not convinced that the law and economic arguments would succeed in this context because protecting ownership in favour of personal autonomy and economic freedom can be questioned in the South African context, which requires the same ‘dignity’ for all.\textsuperscript{52} On the basis of the reasoning set out above, Froneman J concurred with the finding of Madlanga J’s majority judgment, which ordered that Ms Daniels is entitled to effect improvements to the dwellings to bring the home to a habitable state.

Cameron J also wrote a separate judgment in which he concurred with the reasoning and conclusion reached by Madlanga J in the majority judgment. Cameron J, however, cautioned against the first judgment (Madlanga J) and the second judgment (Froneman J) insofar as both those judgments were, according to him, partial and incomplete.\textsuperscript{53} Jafta J (with Nkabinde J concurring) in turn, agreed with the finding of the majority judgment, but disagreed with the question of whether the Constitution imposes positive obligations on private persons.\textsuperscript{54} Madlanga J held that just because a positive obligation may be enforced on a private party in very particular circumstances should not prevent a finding that would allow Ms Daniels occupation with dignity. Jafta J reasoned that although certain provisions in the Bill of Rights do apply horizontally in terms of s 8(2) of the Constitution, this does not imply that a positive obligation can be placed on private persons.\textsuperscript{55} In other words, certain provisions in the Bill of Rights are enforceable against the state and a private individual, but that does not necessarily mean that a private individual (like the owner) could be saddled with a positive obligation to give effect to the right.\textsuperscript{56} This point was, however, purely academic as Ms Daniels agreed to pay for the improvements and that obligation did not — in this particular case — rest on the owner. The judgment of Zondo J also concurred with the first judgment, and Zondo J agreed that considerations of justice and equity require that the applicant be allowed to effect the improvements to the dwelling.\textsuperscript{57}


\textsuperscript{51} Daniels (note 7 above) at 143.

\textsuperscript{52} Ibid at para 143.

\textsuperscript{53} Ibid at paras 148, 153.

\textsuperscript{54} Ibid at para 156.

\textsuperscript{55} Ibid at para 156.

\textsuperscript{56} Ibid at paras 157–158. See further below at s 4.

\textsuperscript{57} Ibid at para 217.
IV THEORETICAL IMPLICATIONS OF DANIELS: WHERE IS PROPERTY?

A Introduction

A lot has been written in the media about this decision, especially about its impact and reach. Schindlers (attorneys, conveyancers and notaries) explain that this decision —

‘has set a precedent for people who were previously disadvantaged and are living on another’s property as occupiers in terms of ESTA to be able to effect improvements to their dwellings to bring them in line with conditions that are conducive to human dignity. In the event that the owner of the property refuses [sic] to the improvements and there is no amicable solution, the court should still be approached before anything further is done.\(^{58}\)

Pierre de Vos writes that this judgment has ‘considerable rhetorical power to address a modest aspect’ of the legacy of ‘dispossession from land of black people by white people’. He goes on to explain that although the judgment may not actually have any immediate distributional effects, ‘it contains important jurisprudence which social justice lawyers will be able to use in other cases to change the way we think of land and land ownership in South Africa. The judgment calls on us to think of land in terms of relationships, rather [than] purely in terms of rights that owners can enforce to exclude others from using land for any purpose.’\(^{59}\) In light of these statements, it is clear that it is necessary to consider the impact of this judgment on property law.\(^{60}\)

Although the ultimate finding of the Court allows Ms Daniels to effect basic improvements to the dwelling without the landowners consent, and may in that regard be considered far-reaching, it is possible to identify at least two reasons why the impact is not as far reaching as many may assert. Firstly, if one for a moment turns to the impact of the outcome for the owner, it is important to note the following: Ms Daniels was willing to pay for the improvements herself, and the burden for the payment and effecting of the improvements did not fall on the owner in this specific case. This means that the owner simply had to allow Ms Daniels to make the improvements; the owner did not have to pay for such improvements. In this respect, this was certainly an easier case in terms of ownership of property. A harder case would be one in which the argument rested on an owner’s obligation to bring the dwellings to a habitable state. Therefore, the question of whether the owner has (or can have) a positive obligation to bring the dwellings to a habitable state was not answered (at least not directly as necessitated by the


\(^{60}\) In an academic article, Marais & Muller (note 9 above) at 783 argue that the Court’s reliance on ESTA (specifically s 5(c) of the Act), results in what the author’s call a ‘strained’ interpretation of the Act. They find it difficult to see that s 5(c) of the Act in fact allows for an occupier to effect improvements to the dwelling to bring it to the standard of habitability. On this basis, the authors argue that a more appropriate result would have been to rely on the law of unjustified enrichment (which would have to be developed) to allow for an expansion of the categories of lawful occupiers to improve land without a landowner’s consent. Developing the common law in this regard to provide Ms Daniels with the relief she sought in these circumstances would not require the ‘strained’ interpretation of the Act as advanced by Muller & Marais. It would also be in line with the authors’ argument in favour of principles of subsidiarity. For criticism of Muller & Marais, see Davis (note 9 above). Davis raises some important questions about statutory interpretation in a constitutional democracy (note 9 above at 429) and the importance of appreciating the relief that a claimant seeks on the basis of a very specific cause of action (note 9 above at 431).
facts of the case). The Constitutional Court has been clear that although private parties bear negative obligations not to interfere with the current enjoyment of socio-economic rights, the primary positive obligation in realising socio-economic rights rests on the state. In that sense, the conclusion is that Daniels is context specific, and it does not (necessarily) imply an overall positive obligation on owners to ensure that occupiers inhabit dwellings that are in a habitable state. As much was confirmed in a subsequent Constitutional Court decision, namely Baron and Others v Claytile (Pty) Ltd and Another, where the Court stated that a positive obligation may be imposed on a private landowner (in this case to provide suitable alternative accommodation) only in truly exceptional circumstances taking into account the specific context, and by having regard to all relevant circumstances.

The second reason for being a bit more hesitant in terms of the overall impact of this judgment is that the owner had conceded that the dwelling was not fit for human habitation. Therefore, the outcome in Daniels does not warrant the overall conclusion that owners who make their properties available for others to inhabit, like tenants or usufructuaries, will always be required to accept that the inhabitants are able to make improvements without the consent of the owner. Although the outcome could probably be extended to tenants and usufructuaries who wish to improve the dwelling of the owner, it will only be possible in instances where the dwellings do not meet a standard of habitability, which would have to be determined in each case as no common standard of habitability exists across different categories of inhabitants. If the owner concedes that the dwelling is not fit for human habitation, or the applicant can prove that work needs to be done to bring the home to a habitable state, Daniels may provide authority for the inhabitant (being an occupier, tenant or usufructuary) to effect the

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61 For a recent account on private duties in relation to the Daniels decision, see Rautenbach (note 9 above) at 959.
62 See especially Governing Body of the Juma Musjid Primary School & Others v Essay NO & Others (CCT 29/10) [2011] ZACC 13, 2011 8 BCLR 761 (CC) 54–60. In this decision, the Court held that the primary obligation to provide basic education rests on the state. However, once a private landowner has permitted the state to establish a school on its land, it bears a negative obligation not to unjustifiably interfere with the enjoyment of that right. This decision is a good example of how the Constitutional Court (unlike the high court and the Supreme Court of Appeal) does not summarily admit private interests (right of owner to evict) to trump public interests (right of learners to basic education). See further S Woolman The Selfless Constitution (2013) 471–473.
64 In Baron, the Court did not, based on the specific context and having regard to all relevant circumstances, impose a positive obligation on the private landowner to provide suitable alternative accommodation.
65 Daniels (note 7 above) at para 7.
improvements without the owner’s consent, provided the inhabitant bears the responsibility of making the improvements himself.\textsuperscript{66}

Although the impact of the Daniels decision may be limited in the twofold sense mentioned above, what is evident from the judgment is that the proverbial owner standing up against a non-owner, and in most instances winning, is (at the very least) contested — and there is probably no better place to see it than in the context of the ability (or inability) to protect and uphold property rights. There are increasingly more calls for the legitimization of interests that would traditionally never have been upheld against the rights of ownership.\textsuperscript{67} This challenges the inclusion/exclusion dichotomy that to a large extent dominates (or at the very least, underpins) the institution of property, and which determines the remedial options that are available to landowners to protect their property interests. Very importantly, this forms the crux of the distinction between the underlying premises of information and progressive theorists. Whereas information theorists focus on the inclusion/exclusion dichotomy as the central feature of a property system, progressive theorists tend to be occupied with values as the basis for understanding property law. In this respect, this outcome in Daniels falls squarely in the progressive school of thought.

\section*{B Taking a step back: social dimensions, inclusion and exclusion}

Froneman J observed in Daniels that ownership has a social dimension that cannot be ignored. He referred to this aspect of property law as the ‘social boundedness of property’,\textsuperscript{68} which recognises that ownership in a very real sense perpetuates existing inequalities to the extent that it stands in the way of transformation. A direct correlation exists between the vantage point from which ownership is viewed and the social relationship that ownership either encourages, or perhaps more importantly, discourages. Laura Underkuffler argues that property is more than the rights, privileges and immunities that a person holds; property can be seen as the ‘spaces’ or networks of relationships that decides inclusion or exclusion and, therefore, establishes the rights that property involves.\textsuperscript{69} Joseph Singer similarly points out that property is an ‘intensely social institution’, which ‘implicates social relationships’ that are a combination of individualism and communal responsibility.\textsuperscript{70} When you see property not just

\textsuperscript{66} Given that there is currently no standard by which to judge habitability (some may argue that a second window is not necessary to make the dwelling habitable, but most may agree that installing water would make it habitable), a determination of what would be regarded as habitability cognisant with human rights will most probably involve a judicial process. In this regard, the question of what would be considered ‘habitable’ is arguably context specific, and no general rule has been established. Interestingly, in the landlord-tenant context, there are some obligations that rest on the landlord to ensure that the premises being let is ‘reasonably fit’ for the purpose for which it was let. See G Glover Kerr’s Law of Sale and Lease 4 ed (2014) 382; Harlin Properties (Pty) Ltd & Another v Los Angeles Hotel (Pty) Ltd 1962 (3) SA 143 (A) 150. An implied warranty of habitability therefore arguably already exists in the context of landlord and tenant, although that would be based on the lease agreement (whether implicit or express). Therefore, it is not the standard of habitability that is required by the Constitution (or ESTA).

\textsuperscript{67} Van der Walt (2014) (note 16 above) at 15–16.

\textsuperscript{68} Daniels (note 7 above) at para 135.

\textsuperscript{69} See Underkuffler (2016) (note 22 above) at 301 where Underkuffler argues that subversive property challenges exist in property relations, because they manifest alternative relations of belonging.

\textsuperscript{70} Singer (2000) (note 14 above) at 3.
as an entitlement, but as a system, it becomes important to evaluate the character of the social relationships that are shaped by the system.\textsuperscript{71}

The rights of property, when seen as upheld by existing networks of social relations, are vulnerable to the necessarily dynamic nature of those relations. Because of the symbiotic relationship between property and underlying social networks, entrenched property arrangements can be subverted by the assertion of nonconforming identities and expectations.\textsuperscript{72}

In other words, the mere existence of alternative arrangements challenges the status quo.\textsuperscript{73} If we see existing relations of inclusion and exclusion in ‘property’ terms, we immediately understand their importance. Furthermore, if we see competing relations in those terms, we immediately understand their importance and potential power as well. It is probably in this sense that Froneman J remarked that this case actually illustrates how far South Africa still has to go before the promises of the Constitution are fulfilled.\textsuperscript{74} Interestingly, Singer notes that ‘[o]ur views about minimum standards of decency and the requisites of an economic system compatible with human dignity are crucially influenced by the sources of our ultimate values and beliefs.’\textsuperscript{75} In this regard, the resistance against change — in favour of the status quo — is in a certain sense understandable since —

\begin{quote}
[p]rotection against change is something for which most human beings, at least in part, yearn. It is a staple of our daily lives that we welcome change that we want, and fiercely resist change that we do not want. The persistence of dominant regimes of inclusion and exclusion are predictable manifestations of these deeper human desires.\textsuperscript{76}
\end{quote}

It is clear that the existing remedial structures — or institutions — have undergone a substantial change with the introduction of the Constitution. However, the property institution in South African law is still predominantly based on the inclusion and exclusion paradigm and therefore litigants (and courts) struggle to envision a system in which rights other than real rights (especially ownership) should be protected. Even though legislative reform has somewhat shifted our understanding of property relations, the system as a whole is still largely geared towards protecting the status quo. Consequently, it becomes difficult to comprehend the protection of any other interests that can (or should) in the new constitutional dispensation legitimately stand up against ownership. That is, unless you take a step back.

Cases like \textit{Daniels} force us to take that step, and think about the implications of this decision for the question of: Where is property? The judgment may be forcing us to think about property in shared (or sharing) terms as advanced by Rashmi Dyal-Chand. This judgment may also be requiring of us to think about property on the fringes when other non-property (constitutional) rights are at stake as advanced by Singer in \textit{The Edges of the Field} and Van der Walt in \textit{Property in the Margins} (and later in an article entitled \textit{The Modest Systemic Status of Property Rights}). We

\textsuperscript{71} Ibid at 21.

\textsuperscript{72} Underkuffler explains that in the process of seeking asylum, applicants ‘have been forced to pretend that they fit the dominant culture’s stereotypes of acceptable human sexuality and national identity. They have been forced to deny the validity of their roots, and the contradictions and complexities that are inherent in human identity.’ See Underkuffler (2016) (note 22 above) at 303. There is an underlying rhetoric of inclusion and exclusion — based on a narrative of belonging — that comes out in the asylum example produced by Underkuffler.

\textsuperscript{73} Ibid at 302 where Underkuffler provides examples of instances in which subversive property appears in order to unsettle the status quo.

\textsuperscript{74} Daniels (note 7 above) at para 112.

\textsuperscript{75} Singer (2000) (note 14 above) at 41.

\textsuperscript{76} Ibid at 42.
use these works to start engaging with the outcome in Daniels, especially in terms of what it means for our understanding of property in the new constitutional dispensation. What is clear is that the Court’s outcome is evidently an embodiment of ideals advanced by the progressive theorists.

C Finding a theoretical explanation for the outcome in Daniels

In her attempt to rethink the way property law determines outcomes, Rashmi Dyal-Chand argues that ‘[p]roperty outcomes have the potential to address acute problems of fairness and distributive justice to a much greater extent than they currently do.’ The outcome in the Daniels decision may well be an embodiment of what Dyal-Chand had in mind. The case was actually about the interpretation of ss 5 and 6 of ESTA. However, the outcome of the case tells an important story of shared property, in some instances directly, but in other places more subtly and less explicitly. In order to see this, it is necessary to concisely unpack the idea of sharing, and then to return to the Daniels decision in order to reflect on how the outcome of the decision reveals the notion of sharing. As mentioned, Dyal-Chand’s interest-outcome model fits comfortably into a property system as envisioned by progressive scholars. Applying her model to the outcome in Daniels clearly shows a property system that favours outcomes that focus on values rather than inclusion and exclusion.

Dyal-Chand argues that in some cases it does not help to make title (or ownership) the decisive factor in establishing the outcome, because, in instances where ‘ownership is so determinative of outcome, courts are terribly constrained in the remedies they can provide.’ Therefore, Dyal-Chand explains as follows:

[O]utcomes are [often] tagged to exclusion in the form of blanket property rules and ‘keep out’ signs … Sharing as an outcome is a powerful means of addressing property inequalities, limiting harmful externalities, preserving efficiency, and harnessing the extraordinary potential of outcomes in property law.

Sharing, in the sense in which Dyal-Chand uses it, is not simply about elevating a non-owner’s interest above the owner’s right, or even finding exceptions to ownership — it is rather about courts being creative in fashioning remedies that incorporate the idea of sharing rather than the practice of exclusion. Dyal-Chand provides various instances in which the idea of sharing is central to property law, yet ironically the opposite of sharing (namely exclusion) is said to be the thematic foundation of property law. In some cases, exclusion is seen as the defining characteristic of property ownership and the goal of property law is therefore essentially to protect ownership by excluding non-owners. In this regard, Muller et al point out:

This exclusionary approach indicates support for the notion that ownership is the pinnacle of — or the most important right within — a hierarchy of rights, with limited real rights following close at heel. Other rights are understood as being in stages of inferiority to ownership as far as their protection in property law and publicising thereof are concerned. This hierarchical approach to landownership and other rights to land is increasingly coming under scrutiny for failing to provide acceptable solutions to

77 Dyal-Chand (note 13 above) at 653.
78 Ibid at 654.
79 Ibid at 647.
80 Ibid at 650.
81 Ibid. See also Penner (note 19 above) at 68–74; Merrill (note 19 above) at 730–731; Merrill & Smith (note 19 above) at 1857; Smith (note 19 above) at 1728.
the increased pressure placed by a proliferation of land reform legislation on the existing registration and land control system in South Africa.82

Dyal-Chand argues that sharing exemplifies a broader problem of impoverished outcomes in property law.83 She makes a theoretical claim by arguing that it matters whether a system of property law is grounded on a sharing model as opposed to a model based on exclusion. If a system of property law is more exclusion-oriented, it will often have the effect that the system is more concerned with asking who has the stronger title, and it becomes difficult to conceive of solutions other than protecting stronger title. Therefore, ‘over-reliance on the exclusion model limits our imagination in developing superior outcomes in property disputes that have the potential to protect more legitimate interests in valued resources’.84

Dyal-Chand also makes a pragmatic claim in terms of which she contends that there are instances in core doctrinal areas where courts have already shown a tendency towards property sharing. However, in this regard courts lack the ‘vocabulary and remedial building blocks to prioritize sharing’85 as a remedial framework. Therefore, courts instinctively fall back on all-or-nothing solutions grounded on the exclusion model, despite a solution based on sharing being superior both from a fairness and an efficiency perspective.86 Dyal-Chand therefore attempts to provide a contemporary template for remedies, one that focuses on outcomes rather than title. She cautions that her model does not discard the question of entitlement in its entirety in the sense that the question of who has an entitlement becomes irrelevant, but she argues that the question of entitlement has far greater potential to recognise a broader range of legitimate interests in a property dispute than it currently does.87 There may thus be reasons other than economic efficiency that motivate people to seek to protect rights or entitlements.88 The types of interests that she has in mind in this regard include human capabilities, democratic ideals, community norms and cultural values.

There may thus be instances in which a non-owner has a legitimate interest that may justify some degree of access or use (or sharing) where the exclusion paradigm does not provide much assistance in the attempt at finding appropriate remedies.89 Dyal-Chand therefore foresees that the benefits of a model based on interest-outcome are mostly pragmatic in nature because the reality of allocation of relatively few resources opens up the need for exceptions to core doctrines, balancing tests and implying rights where these were not negotiated.90 Therefore, theories that are aimed at reducing costs associated with obtaining information to make decisions about property do not always take the various externalities such as distributional injustice into account, whereas the sharing model aims to address equitable outcomes and distributions that are fairer.91

82 G Muller, R Brits, JM Pienaar & ZT Boggenpoel Silberberg and Schoeman’s The Law of Property (6th ed, 2019) 75.
83 Dyal-Chand (note 13 above) at 652.
84 Ibid at 655. Dyal-Chand makes this point by looking at an example in medieval times. With writs the focus was much more on outcome and property use with relatively little attention being paid to formal title.
85 Ibid at 655.
86 Ibid.
87 Ibid at 656.
88 Ibid at 667–668.
89 Ibid at 706.
90 Ibid at 722.
91 Ibid at 723.
Van der Walt explains that there may be various contexts in which the interest-outcome model may be useful to explain when it may be necessary to adopt or forge new, non-exclusionary remedies that provide a richer array of remedial possibilities than those that currently exist.\textsuperscript{92} South African law already provides various instances where non-exclusionary sharing remedies are evident, for instance private law examples where ‘considerations of justice and fairness or economic use of land indicate that blunt enforcement of exclusion remedies would be unsuitable and that a viable sharing option is available’,\textsuperscript{93} or examples in constitutional law where sharing remedies are not inspired by fairness considerations, but rather ‘emerge from the promotion of non-property constitutional rights and goals such as equality, dignity or access to housing’.\textsuperscript{94}

The \textit{Daniels} judgment was not a case specifically about sharing of property in the sense argued by Dyal-Chand, although, in the end, the \textit{outcome} in \textit{Daniels} was very much about property sharing. The owner was forced to share more of its property than it originally anticipated, or even wished. In line with Dyal-Chand’s ideas around sharing, the Court recognised and focused its attention around a legitimate interest on the other side of a property dispute that justified a greater degree of use (or sharing). Therefore, the focus was indirectly on the \textit{use} made of property as opposed to the question of who has title and the consequent ability to exclude others from making decisions about the property. The Court specifically did not make title (or ownership) the decisive factor in the determination of whether the occupiers could make the improvements, because that may have constrained the Court in the remedies it provided. In this sense, in line with the sharing ideal, the Court in \textit{Daniels} was not deliberately searching for opposing rights that are more or less equal to ownership (or that can legitimately stand up against ownership), but the Court was looking for ways in which a non-owner has demonstrated a particular need to share in the owner’s property, under the protection of human dignity as given effect to in ESTA.\textsuperscript{95} There were therefore legitimate interests on both sides of this property dispute, and the simple determination of who has the strongest title would not have been preferable in determining the outcome in the particular case.

Another interesting way of considering the theoretical implications of \textit{Daniels} is through the lens of marginality. Van der Walt argues that in the new constitutional dispensation the ‘perspective of the outsider, the fringe dweller … the weak and the marginalised’\textsuperscript{96} must be taken into consideration. In his book entitled \textit{Property in the Margins}, he argues that in order to solve some problems it is impossible to do so with ‘normal legal science’, instead it is necessary to solve some problems with ‘reference to the actual experiences of those who find themselves on the margins of society and of property distribution patterns.’\textsuperscript{97} He makes this suggestion because he maintains that it is only possible to see real and meaningful transformation of property from outside the property paradigm.\textsuperscript{98} In this respect, Van der Walt posits that —

\begin{itemize}
  \item the argument is that what I describe as the property regime, including the current system of property holdings and the rules and practices that entrench and protect them, tends to insulate
\end{itemize}

\begin{footnotes}
\item[92] Van der Walt (2015) (note 29 above) at 220.
\item[93] Ibid at 219.
\item[94] Ibid.
\item[95] Dyal-Chand (note 13 above) at 652.
\item[97] Van der Walt (2009) (note 15 above) at 23.
\item[98] Ibid at 26.
\end{footnotes}
itself against change (including social and political transformation) through the security- and stability-seeking tendency of tradition and legal culture, including the deep assumptions about security and stability embedded in the rights paradigm.99

The goal of Van der Walt’s book is therefore to investigate the effects of the rights paradigm on the ‘margins of property law and of society, by establishing the actual efficacy and power of reformist or transformative anti-eviction policies and legislation aimed at the protection of marginalised and weak land users and occupiers.’100 In his essay, entitled The Modest Systemic Status of Property Rights, Van der Walt takes the debate of the ‘over-inflated perception of property as simple message of keep off further’ by arguing ‘that the legal protection of property rights in fact plays — and should play — a surprisingly modest systemic role in the law.’101 He makes the argument in the narrow context in which landowners seek to exclude from their property others who wish to exercise non-commercial rights on land that is either quasi-public or private property with restricted public access.102 In these contexts he argues it should be determined whether ‘it is systemically important to at least consider whether conflicts should not be decided on the basis of non-property rights, even though property rights are affected.’103

If one uses this argument to start thinking about the Daniels decision, it is important to realise that the outcome of this case was not determined with reference to ownership because within the rights paradigm the qualification or exception to ownership would have to be accommodated. Instead, considerations about the type of society we want to live in, one where dignity for all is respected, can be seen as the underlying base from which the case proceeded. This is in line with Jane Baron’s conceptualisation of progressive theorists in which ‘[t]he only important question is whether we have the right quality of social relations and if we do not, then property rights must be adjusted’.104 In this respect, Froneman J’s judgment in Daniels probably came closest to explaining the outcome in property terms, as doctrinally acceptable exceptions or developments of the property for the sake of social or political policy reasons.

Interestingly, Singer explains that a problem can arise when a nation’s political and moral commitments are in tension, even in contradiction. When one reads Daniels, one almost gets this sense of the contradiction that Singer may be eluding to here:

On one side are claims of property; on the other side are claims of humanity. On one side are claims to rights; on the other side are acknowledgements of responsibilities. On one side are the values of liberty and autonomy; on the other side are values associated with security, social stability, and solidarity.105

Singer makes the claim that self-interest means that we can live on our own terms. However, it also has a dark side in the sense that it promotes indifference to the effects of our actions on others.106 He goes further to argue that we could pay attention to those on the margins, those outside the boundaries, and those on the edges of the field. We could adjudicate the tensions we face between competing interests by developing laws and policies that will spread the wealth more evenly and allow every person to obtain a decent life. The crucial question is: Why should

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99 Ibid at preface vii.
100 Ibid at preface vii.
102 Ibid at 27.
103 Ibid at 30.
104 Baron (note 1 above) at 961.
106 Ibid at 10–11.
we do this? We should focus, according to Singer, on the importance of human dignity, the sanctity of the individual, because of the maxim that no one is an island.  

107 If the ability to lead a decent life is important, it is equally important for every person. If property is necessary to obtain the ability to lead a decent life, then, every person must have a realistic opportunity to obtain access to property.  

108 However, because property is essentially exclusionary, protection of the rights of owners may have the effect of leaving others out of the system. Therefore, Singer suggests that unless the government in South Africa can implement policies that spread access to property more widely, the newfound ideals of equality, freedom, and democracy will be fatally undermined. It is essential to shape property institutions so that it is realistically possible for everyone to enter the system and obtain a decent livelihood.

109 When asking the question of what values should inform the property rules and institutions we choose, we should not ignore distributive issues and simply try to maximize the size of the economic pie.  

110 This is exactly what the outcome in Daniels shows: that ‘[t]he laws and policies governing and surrounding property must protect established claims while simultaneously ensuring the presence of realistic opportunities for those who have not yet been able to establish property claims.’

V ASSESSMENT: WHERE IS PROPERTY REALLY IN LIGHT OF DANIELS?

So, where is property in light of Daniels v Scribante? And, perhaps more importantly, what can be expected from property within a constitutional and statutory context after Daniels. These questions are important if we are to make sense of property obligations and what parties may be required to ‘give’ in line with the Constitution. The Court in the subsequent case of Baron v Claytile pointed out ‘[t]his Court has long recognised that complex constitutional matters cannot be approached in a binary, all-or-nothing fashion, but the result is often found on a continuum that reflects the variations in the respective weight of the relevant considerations.’

112 Therefore, the duties that ownership of land — and property law more generally — comes with in the new constitutional dispensation may differ from the obligations that owners may have had in the pre-constitutional context.

Although the statements uttered in Daniels relating to property or ownership are not new, they are a reminder of the particular context within which property must be understood in the new constitutional dispensation. In this sense, Daniels provided a rich analysis of why parties might be expected (especially private landowners) to ‘give’ or undertake more than what was initially anticipated in ESTA. It is for the courts to analyse where the duties and responsibilities begin and end, especially within the legislative framework of ESTA. Therefore, Daniels provides meaning to the provisions of ESTA, specifically in the context of the meaning of security of tenure. The judgment is also crucial because it tells an important story about what property means (and the appropriate place of property law) in the current constitutional dispensation. Arguably, Daniels illustrates quite pertinently that where you begin — in other words, your theoretical vantage point — quite clearly determines the outcome you will achieve. In this regard, the progressive theories of Dyal-Chand, Singer and Van der Walt provide some

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107 Ibid at 36–37.
108 Ibid at 27.
109 Ibid at 17.
110 Ibid at 36.
111 Ibid at 32.
112 Baron & Claytile (note 63 above) at para 36.
explanation of exactly this point, especially in so far as they relate to the outcome in *Daniels*. *Daniels* shows ‘that we, as a society, have simply abandoned traditional notions of property-as-protection in favour of an idea of property that confers much greater collective control.’\textsuperscript{113} The case clearly aligns with a property system underpinned by the philosophy of progressive theorists rather than the school of thought advocated by information theorists — a dualism so aptly set out by Jane Baron.

\textsuperscript{113} Underkuffler (2016) (note 22 above) at 3.
The Problems with Prince: A Critical Analysis of Minister of Justice and Constitutional Development v Prince

NABEELAH MIA

ABSTRACT: Over two years ago, South Africa saw the decriminalisation of the use, possession and cultivation of cannabis by an adult in private in the landmark judgment of Minister of Justice and Constitutional Development v Prince (Clarke and Others Intervening); National Director of Public Prosecutions v Rubin; National Director of Public Prosecutions v Acton (Prince III). This judgment was the culmination of a journey that started in the 1990s. This case note is a critical assessment of that judgment. In it, I argue that some of the characteristics of judicial minimalism can be seen in Prince III, namely, incomplete and incoherent reasoning and a focus on the desired outcome. The case note focuses on two main problems in the Court’s reasoning. First, the lack of adequate reasoning around the nature of the right to privacy and an articulation of what being ‘in private’ entails. Second, a limited and incomplete limitations analysis in terms of section 36(1) of the South African Constitution. Both failures contribute to an unsatisfactory outcome which has confused the public, as well as the policing authorities.

KEYWORDS: limitations analysis, right to privacy, s 14 of the Constitution

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I INTRODUCTION

Eighteenth of September 2018 marks what many consider to be a momentous day for South Africa — the Constitutional Court of South Africa (the Court) decriminalised the private use, possession and cultivation of cannabis by an adult for private consumption. The Court held that the criminalisation violated the constitutionally enshrined right to privacy. On the face of it, this is a progressive judgment. However, the aftermath has seen inconsistency in the implementation of the judgment, resulting in continued arrests of adults who use, possess and/or cultivate cannabis in private for private consumption; and an increased amount of work for the policing and prosecuting authorities.

This case comment is a critical assessment of the Prince III judgment, and how it has contributed to this situation. The overall argument of this case comment is that the Court focused on a particular outcome without providing adequate justification for its conclusions. To do so would have pushed the Court towards broader decriminalisation of the use of cannabis than it was prepared to accept at that stage.

Part II provides the background to Prince III. Part III outlines and summarises the Prince III judgment. Part IV analyses Prince III’s failure in two parts. First, the case comment analyses the Court’s failure to provide a thorough analysis of the right to privacy and how this right allows for the use, possession and cultivation of cannabis by an adult for private consumption in private. Second, the case comment shows how the Court failed to conduct an adequate (and sometimes correct) limitations analysis in terms of s 36(1) of the Constitution. I argue that both failures contribute to an unsatisfactory outcome which has confused the public and policing authorities.

1 Minister of Justice and Constitutional Development v Prince (Clarke & Others Intervening); National Director of Public Prosecutions v Rubin; National Director of Public Prosecutions v Acton [2018] ZACC 30; 2018 (6) SA 393 (CC) (Prince III).


3 Briefing to Justice and Correctional Services Portfolio Committee on the National Prosecuting Authority 2019/20 Annual Performance Plan (9 July 2019) available at https://pmg.org.za/committee-meeting/28532/.

4 Prince III (note 1 above) at para 88.
II BACKGROUND TO PRINCE III

A Prince II and the aftermath

In the late 1990s, Gareth Anver Prince (Prince) applied to the Law Society of the Cape of Good Hope (as it then was) to register his contract of community service in order to qualify as an attorney. In his application, he disclosed that he had two previous criminal convictions for possession of cannabis and that he intended to continue using cannabis as he identified as a Rastafari. The Law Society refused to register his contract of community service as it was of the view that Prince was not a fit and proper person to be admitted as an attorney: he had not only two previous convictions, in addition, he declared his intention to continue breaking the law. According to the Law Society, as long as there was a prohibition on the use and possession of cannabis, Prince would consistently break the law and bring the attorneys’ profession into disrepute. Prince unsuccessfully challenged the constitutionality of the Law Society’s decision in both the High Court5 and the Supreme Court of Appeal6 on the grounds that it infringed his rights to freedom of religion, to dignity, to pursue the profession of his choice, and not to be subjected to unfair discrimination.

The matter first came before the Court in 2000 when Prince broadened his constitutional challenge to include a challenge to s 4(b) of the Drugs and Drugs Trafficking Act7 (Drugs Act) and s 22A(10) of the Medicines and Related Substances Act8 (Medicines Act) on the grounds that they did not exempt from prohibition the use, possession and transportation of cannabis for religious purposes by adult Rastafari. He alleged that these statutory provisions violated the right to privacy. In Prince I9 the Court held that as the focus of the challenge had been on the decision of the Law Society, there was insufficient information on record to determine the constitutionality of the impugned provisions. After extensive argument, the parties were granted leave to submit further evidence in the form of affidavits. The Court directed Prince to deal, amongst other things, with the circumstances under which Rastafari use cannabis, while the respondents in that matter were directed to respond to Prince’s evidence and, in addition, deal with practical problems that could arise from the granting of a religious exemption. Following this, the parties appeared before the Court again, resulting in the Prince II judgment.

In a 5:4 split, the Court in Prince II dismissed the application.10 Both the majority and the minority held that the general statutory prohibition on the possession of cannabis was a limitation of the right to freedom of religion. Rastafarianism is a religion, and the use and consumption of cannabis is of great importance to the religion. The statutory prohibition on the possession of cannabis was therefore a limitation of the practical element of this right, that is, the right to manifest one’s beliefs.11

According to the majority, a prohibition would not have been overbroad if an exception for religious use (similar to that for medical use) had been practically feasible, which the majority thought it was not. The majority held an exception would be too difficult for the police to

5 Prince v President of the Law Society, Cape of Good Hope and Others 1998 (8) BCLR 976 (C)
6 Prince v President, Cape Law Society, and Others 2000 (3) SA 845 (SCA); 2000 (7) BCLR 823 (SCA)
8 101 of 1965.
9 Prince v President of the Law Society of the Cape of Good Hope & Others [2000] ZACC 28; 2001 (2) SA 388 (CC); 2001 (2) BCLR 133 (CC) (Prince I).
10 Prince v President of the Law Society of the Cape of Good Hope [2002] ZACC 1; 2002 (2) SA 794 (Prince II).
11 Ibid at para 38.
enforce and would therefore undermine the general prohibition.\textsuperscript{12} A permit system for Rastafari would entail financial and administrative costs associated with setting up and implementing such a system. There would also be considerable difficulties in policing the system given the private nature of much religious consumption of cannabis and the absence of an established, formally organised structure for the religion.\textsuperscript{13} According to the minority, the constitutional defect was that the statutory prohibition on the possession of cannabis was overbroad. It was not carefully tailored to constitute a minimal intrusion upon the right to freedom of religion and was thus disproportionate to its purpose. It was constitutionally deficient because it did not allow for the religious use of cannabis that is not necessarily harmful and that can be controlled effectively.\textsuperscript{14}

Following the outcome of \textit{Prince II}, Prince sought legal recourse from international human rights institutions.\textsuperscript{15} First, he approached the African Commission on Human and Peoples’ Rights with the complaint that South Africa was in violation of various articles of the African Charter on Human and People’s Rights for failing to allow him an exemption. Further, similar to the relief asked for in \textit{Prince II}, he requested that the African Commission grant an exemption for the sacramental use and possession of cannabis. The African Commission found that South Africa had not violated the articles, and rejected the request for the drafting of an exemption.\textsuperscript{16} Thereafter, Prince escalated the matter to the United Nations Human Rights Committee, alleging that South Africa violated his rights under various articles in the International Covenant on Civil and Political Rights (‘ICCPR’). Unfortunately, again, the Human Rights Committee found that the South African prohibition on cannabis use did not violate the provisions of the ICCPR.\textsuperscript{17}

\textbf{B The High Court judgment and the lead up to \textit{Prince III}}

Despite these setbacks, in 2013 Prince was back before the South African courts, specifically the Western Cape High Court (the High Court).\textsuperscript{18} This time, he challenged the following impugned sections collectively: ss 4(b) and 5(b) of the Drugs Act, read with Part III of Schedule 2 to that Act, and ss 22A(9)(a)(i) and 22A(10) of the Medicines Act read with Schedule 7 of GN R509 of 2003 published in terms of s 22A(2) of the Medicines Act. Section 4(b) prohibits the use or possession of any dependence-producing substance or any undesirable dependence-producing substance unless one or more of the exceptions listed therein applies.

\begin{itemize}
  \item \textsuperscript{12} Ibid at para 134.
  \item \textsuperscript{13} Ibid.
  \item \textsuperscript{14} Ibid at para 83.
  \item \textsuperscript{17} \textit{Prince v South Africa} (2007) AHRLR 40 (Human Rights Commission 2007).
  \item \textsuperscript{18} \textit{Prince v Minister of Justice and Constitutional Development & Others; Rubin v National Director of Public Prosecutions & Others; Acton 7 Others v National Director of Public Prosecutions & Others} [2017] ZAWCHC 30; 2017 (4) SA 299 (WCC) (High Court judgment).
\end{itemize}
Section 5(b) prohibits dealing in\(^{19}\) any dependence-producing substance or any undesirable dependence-producing substance unless one or more of the exceptions listed in that provision applies. Prince’s case was consolidated with two other cases, those of Jonathan David Rubin in the one instance, and Jeremy David Acton, Ras Menelek Barend Wentzel and Caro Leona Hennegin in the other (Prince, together with the aforementioned parties will hereinafter collectively be referred to as the respondents).\(^{20}\)

Before dealing with the substance of the matter, the High Court (Davis J with Saldanha and Boqwana JJ concurring) first considered whether or not the issues before the High Court were \textit{res judicata}, having previously been disposed of in \textit{Prince II}. Ultimately the High Court judgment held that in \textit{Prince II} the issue was whether or not an exemption for the religious use of cannabis could be granted with regard to the criminalisation of cannabis. However the core of the current issue before the High Court was whether or not the infringement of the right to privacy caused by the impugned provisions was justifiable in terms of s 36 of the Constitution; therefore, the High Court judgment held that the matter was not \textit{res judicata} as it was a broader challenge to that before the Court in \textit{Prince II}\.\(^{21}\)

Turning to the substance of the matter, as noted above, the High Court judgment dealt with the matter on the basis that the case before it was whether or not the infringement of the right to privacy caused by the impugned provisions could be justified in terms of s 36 of the Constitution.\(^{22}\) The case presented added complexity with the respondents alleging a dizzying array of rights violations, including the right to freedom of religion, belief and opinion; the right to freedom of expression; the right to freedom of association; environmental rights; the right to healthcare, food, water and social security rights; language and culture rights; and cultural, religious and linguistic rights. The High Court judgment held that the following paragraph from Prince’s founding affidavit brought clarity to the matter:

> The substantive questions in this matter are to what extent and in what way government may dictate, regulate or proscribe conduct considered to be harmful as well as what is the threshold the harm must cross in order for government to intervene. Can government legitimately dictate what people eat, drink or smoke in the confines of their own homes or in properly designated places? Privacy concerns dictate and our constitution recognises that there should be an area of autonomy that precludes outsider intervention.\(^{23}\)

As part of its analysis, the High Court judgment considered the right to privacy, drawing on the \textit{locus classicus}, the \textit{Bernstein} case.\(^{24}\) The High Court judgment pronounced that it has become established law, insofar as privacy is concerned, that this right becomes more powerful and deserving of greater protection when more of a person’s intimate sphere of life comes under legal regulation.\(^{25}\) The High Court judgment then went on to draw links between the right

\(^{19}\) ‘Dealing in’, as defined in the Drugs Act ‘includes performing any act in connection with the transhipment, importation, cultivation, collection, manufacture, supply, prescription, administration, sale, transmission or exportation’ of a drug. For purposes of \textit{Prince III}, the respondents were seeking the decriminalisation of the purchase and cultivation of cannabis.

\(^{20}\) Rubin, Acton and Wentzel are all members of the Dagga Party.

\(^{21}\) High Court judgment (note 18 above) at para 20.

\(^{22}\) Ibid para 11.

\(^{23}\) Ibid at para 20.

\(^{24}\) \textit{Bernstein \\& Others v Bester NO \\& Others} [1996] ZACC 2; 1996 (4) BCLR 449 (\textit{Bernstein}).

\(^{25}\) High Court judgment (note 18 above) at para 22.
to privacy and the rights to dignity,26 and freedom.27 Ultimately, the High Court judgment focused on the notion that if privacy was considered to be on a continuum where the intimacy within the home constitutes the inner core, community and state interference is not merited.28

The High Court judgment proceeded to analyse the limitation of the right to privacy by the impugned provisions and outlined this process as follows: once it is established that the infringement of a right is of so serious a nature that it is deserving of constitutional protection, a rigorous and careful process must be undertaken with respect to the justification of the impairment.29 The High Court judgment went on to analyse whether the state had discharged the burden of proving that the impairment of the right to privacy was justifiable in three broad respects.

Firstly, it considered the importance of the purpose of the limitation imposed by the impugned provisions. In doing so it considered the state’s main evidence in favour of the limitation: medical evidence of the harm caused by cannabis abuse and the high crime levels associated with cannabis use. The High Court judgment, however, held that the state’s evidence had been successfully refuted by that provided in an expert report prepared for the High Court. Accordingly, the High Court concluded that the state had not established that the prevention of harmful and violent criminal conduct was a legitimate purpose for the prohibition imposed by the impugned provisions.30

The High Court then went on to consider the justification for the limitation imposed by the impugned provisions by examining comparative law and the approach of other jurisdictions. The High Court first considered the Canadian case of *R v Malmo Levine*,31 in which the majority had held that restrictions (similar to those in the impugned provisions) were not contrary to the provisions of s 7 of the Canadian Charter of Rights and Freedom.32 However, the High Court found the approach of the minority judgment in *R v Malmo Levine*, which applied the harm principle, to be convincing. The principle holds that people should be free to do what they want provided that they do not violate any distinct obligation to others. To that extent the application of the principle of harm in relation to the ‘right to privacy located in the context of autonomous individual behaviour within the sanctity of one’s home’ was clearly applicable to the present dispute.33

The High Court then went on to consider the *Arriola* case, decided in 2009, where the Argentinian Supreme Court of Justice declared a provision that criminalised the possession of drugs for personal consumption invaded the private sphere of individuals and breached the constitutionally protected right to privacy.34 Finally, the High Court considered the case of *Ravin*,35 which held that the right to privacy as enshrined in the Alaskan Constitution protected

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26 Ibid at para 23.
27 Ibid at para 24.
28 Ibid at para 25.
29 Ibid at para 30.
30 Ibid at para 53.
32 High Court judgment (note 18 above) at para 66. Section 7 of the Canadian Charter of Rights and Freedom provides that ‘Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice’.
33 Ibid at paras 69–73 for a fuller excursus of this.
34 Ibid at para 75.
35 *Ravin v State of Alaska* 537 P.2d 494 (*Ravin*).
the right to possess and use marijuana in a purely non-commercial context in homes.\textsuperscript{36} In considering these judgments, the High Court judgment noted that there has been a significant change in the approach of foreign courts and legislation to the personal consumption of cannabis, specifically that there was an emerging consensus that the criminalisation and possession of cannabis for personal use was no longer effective in preventing harm. Accordingly, foreign jurisdictions were shifting away from the view that such restrictions were justifiable.\textsuperscript{37}

Finally, the High Court considered the evidence put forward by Deputy National Director of Public Prosecutions that the National Prosecuting Authority (NPA) had introduced various forms of alternative dispute resolution and diversion methods in response to offences related to the possession and consumption of cannabis for personal use.\textsuperscript{38} The High Court judgment held that if the NPA considered diversion to be a more appropriate approach to personal consumption use of cannabis, it strengthened the premise that the state could not justify criminalisation of the personal use and consumption of cannabis, as there were less restrictive means available.\textsuperscript{39}

As a result, the High Court judgment declared the impugned provisions to be unconstitutional and invalid to the extent that they prohibited the use of cannabis by an adult in private dwellings where the possession, purchase or cultivation of cannabis is for personal consumption by an adult.\textsuperscript{40} The High Court suspended the operation of the declarations of invalidity for 24 months to allow Parliament to correct the defects.\textsuperscript{41} However, in recognition of the need for interim relief for those who would be criminalised should the impugned provisions remain in effect, the High Court created a legal defence for the use, possession, purchase or cultivation of cannabis in a private dwelling that was for the personal consumption of the adult accused.

\textbf{III \textit{PRINCE III} – UNPACKING THE JUDGMENT}

Following the High Court’s declaration of constitutional invalidity, it was necessary for the Court to confirm this order in accordance with s 167(5) of the Constitution. The state opposed the confirmation of the order of constitutional invalidity and the respondents cross-appealed the High Court’s limitation of the extent of the decriminalisation to a private dwelling.\textsuperscript{42}

In its judgment, the Court framed the key issue for determination to be whether ‘the prohibition by the impugned provisions of the mere possession, use or cultivation of cannabis by an adult in private for his or her personal consumption in private is inconsistent with the right to privacy provided for in s 14 of the Constitution and, therefore, invalid.’\textsuperscript{43} Like the High

\textsuperscript{36} See below for a more robust discussion of \textit{Ravin}.
\textsuperscript{37} High Court judgment (note 18 above) at para 90.
\textsuperscript{38} Ibid at para 94.
\textsuperscript{39} Ibid at para 106.
\textsuperscript{40} Ibid at para 132.
\textsuperscript{41} Section 167(5) of the Constitution of the Republic of South Africa, 1996 (Constitution) provides that the Court makes the final decision whether legislation passed by Parliament is unconstitutional, and must confirm any order of invalidity made by a lower court, before that order has any force. Accordingly, the High Court did not have the power to make an order about when the declaration of invalidity with respect to the impugned provisions would come into effect, and related to this, nor did it have any power to suspend the operation of the declaration of invalidity.
\textsuperscript{42} \textit{Prince III} (note 1 above) at para 4.
\textsuperscript{43} Ibid at para 51.
Court, the Court also decided the matter solely on the basis of the right to privacy, despite the respondents seeking leave to cross-appeal against the High Court’s failure to declare that the impugned provisions were invalid in terms of the other rights relied on by the respondents.\textsuperscript{44}

The respondents argued before the Court that the right to privacy implicated, and was imperative in upholding, other rights, such as the right to human dignity, the right to freedom and security of person and freedom of movement and residence, and that the High Court erred in only permitting the use and possession of cannabis by adults at home. Furthermore, the High Court erred in not recognising that ‘our right to human dignity, and our right to freedom of movement, retains a personal “sanctum” as we move in any chosen space, whether public or private or communal, in relation to our private carrying of cannabis on my person (sic) in any place I choose.’\textsuperscript{45} The respondents further argued, as they did in the High Court, that the impugned provisions also violated cannabis users’ right to equality in that tobacco and alcohol users enjoyed the right to carry, transport, and freely consume alcohol and tobacco subject to regulation, and that cannabis users should expect the same treatment. In finding that the right to equality was not infringed, the High Court judgment did not rectify the discrimination suffered by the respondents. The Court however held that it was not in the interests of justice to go beyond the right to privacy because the other rights were not properly canvassed in Prince’s founding affidavit in the High Court and that more was needed in the affidavit in respect of how the impugned provisions infringed the other rights.\textsuperscript{46}

Its starting point for determining this issue was to examine the scope and content of the constitutional right to privacy enshrined in s 14 of the Constitution.\textsuperscript{47} The Court, relying on the seminal case of Bernstein,\textsuperscript{48} characterised the right to privacy as a ‘right to be left alone’, free from governmental intrusion.\textsuperscript{49} The Court further drew attention to the dictum in Bernstein that provides that the ‘scope of a person’s privacy’ extends \textit{a fortiori} only to those aspects in which a legitimate expectation of privacy can be harboured.\textsuperscript{50}

The Court went on to consider whether a prohibition on the use and possession of cannabis involves a violation of the right to privacy. The Court compared the issue to the situation that arose in the \textit{Case}\textsuperscript{51} matter which concerned the keeping of erotic material in one’s home. \textit{Case} extended the protection of the right to privacy to encompass the right to keep erotic material in the privacy of one’s home, noting that what one keeps in the privacy of one’s home is ‘nobody’s business but mine’.\textsuperscript{52} The only grounds on which such a right could be limited were those in the limitations clause.\textsuperscript{53} Interestingly, the Court in \textit{Prince III} referenced the corresponding

\textsuperscript{44} Ibid at para 95.
\textsuperscript{45} The Respondent’s Application to cross-appeal (on file with the author).
\textsuperscript{46} \textit{Prince III} (note 1 above) at paras 95–97.
\textsuperscript{47} Section 14 protects the right to privacy both generally, and then specifically, through the protection of both home and bodily searches and seizures, the protection of privacy communications.
\textsuperscript{48} Bernstein (note 24 above).
\textsuperscript{49} \textit{Prince III} (note 1 above) at para 45.
\textsuperscript{50} Ibid at para 47.
\textsuperscript{51} \textit{Case v Minister of Safety and Security; Curtis v Minister of Safety and Security} [1996] ZACC 7; 1996 (3) SA 617 (CC) (‘\textit{Case’}).
\textsuperscript{52} Ibid at para 91.
\textsuperscript{53} Ibid at para 97.
American case of Stanley\textsuperscript{54} which also considered the right to consume and possess pornography as being protected by the right to privacy.\textsuperscript{55}

As an analogy to the issues considered in Prince III, the Court relied on the Supreme Court of Alaska’s finding in the Ravin case. Ravin dealt directly with the use, possession and cultivation of cannabis and its relation to the right to privacy.\textsuperscript{56} This was the only case in America to hold that the American constitutional right to privacy protects some level of cannabis use and possession. The Court in Prince III emphasised a number of points from the ruling. First, the Supreme Court of Alaska conducted a balancing analysis between Ravin’s right to privacy and the government’s interest in imposing restrictions on cannabis use\textsuperscript{57} and concluded that the Alaskan citizens had a basic right to privacy \textit{in their homes}.\textsuperscript{58} Second, Ravin did not encompass protection for the buying or selling of cannabis, or its use or possession in public. It also did not allow for possession of an amount indicative of an intention to sell rather than possession for personal use.\textsuperscript{59}

Having considered this foreign law, the Court held that the privacy entitlements articulated in \textit{Case} in respect of the possession of pornography in one’s home can be extended to an entitlement by an adult person to use, cultivate or possess cannabis in private for their personal consumption.\textsuperscript{60} Thus, to the extent that the impugned provisions criminalised this cultivation, possession or use of cannabis, they limited the right to privacy.

The Court then went on to conduct a limitations analysis in terms of s 36(1) of the Constitution and attempted to consider the factors listed in s 36(1) of the Constitution separately.\textsuperscript{61} The Court chose not to analyse the nature of the right to privacy in the proportionality analysis specifically, instead relying on its more general description of the right conducted earlier in the judgment.\textsuperscript{62} It commenced its analysis by considering the importance of the purpose of the limitation. The Court focused on the interest of the state in the ‘protection of the health, safety and psychological well-being of persons affected by the use of cannabis’.\textsuperscript{63} Relying on its finding in Prince II, the Court also noted that the prohibition sought to prevent the abuse and trafficking of dependence-producing drugs.

With respect to the nature and extent of the limitation, the Court held that the impugned provisions were invasive, providing a blanket criminalisation of the cultivation, possession and consumption of cannabis for personal consumption.\textsuperscript{64} However, it noted that the minority in Prince II had acknowledged that there was a level of consumption which was not harmful though there was a level of indeterminacy in that regard. Finally, the Court considered the last

\textsuperscript{54} Stanley v Georgia 394 U. S. Reports 557 (Stanley).
\textsuperscript{55} Ibid at page 559.
\textsuperscript{56} Ravin (note 35 above).
\textsuperscript{57} Prince III (note 1 above) at paras 55–57.
\textsuperscript{58} Ravin (note 35 above) at 504. The Supreme Court noted: ‘This right to privacy would encompass the possession and ingestion of substances such as marijuana in a purely personal, non-commercial context in the home unless the state can meet its substantial burden and show that proscription of possession of marijuana in the home is supportable by achievement of a legitimate state interest.’
\textsuperscript{59} Prince III (note 1 above) at para 56.
\textsuperscript{60} Ibid at para 58. In doing this, the Court chose not to delineate the boundaries of ‘in private’ when an adult person used, possessed or cultivated to cannabis.
\textsuperscript{61} Ibid at para 59–61.
\textsuperscript{62} Ibid at para 62.
\textsuperscript{63} Ibid at para 63.
\textsuperscript{64} Ibid at para 66.
two factors of the limitation’s analysis together, namely, the relationship between the limitation and its purpose and the less restrictive means to achieve the purpose. The Court started out by listing the evidence provided by the state’s expert witness on the harms of cannabis, highlighting that the expert witness concluded that cannabis had a more harmful effect than tobacco, alcohol and prescription drugs. However, the Court questioned the validity of the evidence itself. Firstly it highlighted that Ngcobo J in *Prince II* had relied on medical evidence to illustrate that small amounts of cannabis do not harm anyone. It then went on to quote from a World Health Report and a 2016 position paper from the South African Central Drug Authority to highlight evidence of alcohol being a more dangerous substance than cannabis. Further, the Court highlighted that *Ravin* (and *Stanley*) illustrated that cannabis use does not cause criminal behaviour. The Court then drew attention to 33 jurisdictions where possession of cannabis in small quantities had been decriminalised.

The Court concluded that the limitation caused by the impugned provisions on the use and possession in private by an adult for their personal consumption was not reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom. Without any further analysis, it extended this to the cultivation of cannabis in private for personal consumption on the grounds that the prohibition of the performance of any activity related to cultivation was inconsistent with the right to privacy and therefore invalid. The Court defined cultivation in private as being in a private place, for example an enclosure or a place that is not the garden, and the cannabis cultivated must be for use in private by the adult person cultivating the cannabis.

However, the Court declined to declare provisions prohibiting the purchase of cannabis invalid. In this regard, it held that doing so would be sanctioning dealing in cannabis, which it found to be a serious problem in South Africa. It found — without saying more — that a prohibition on dealing was a justifiable limitation on the right to privacy and so declined to confirm the constitutional invalidity of s 22A(10) which dealt with the sale and administration of cannabis.

The Court then declared the remaining impugned provisions to be constitutionally invalid. It declined to make the order of invalidity operational with retrospective effect, and further, suspended the order of invalidity to allow the legislature to pass an amended statute. However, it granted interim relief by reading-in to the statute an exception to the impugned provisions. The exception decriminalised the use or possession of cannabis in private, or the cultivation of cannabis in a private place, for personal consumption in private. It also proceeded to outline the effect of the reading-in, firstly, that an adult person may use or be in possession of...

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65 Ibid at para 67.
66 Ibid at para 68.
67 Ibid at para 69.
68 Ibid at para 71–75.
69 Ibid at para 79.
70 Ibid at para 84.
71 Ibid at para 83–86.
72 Ibid at para 85.
73 Ibid at para 87.
74 Ibid at para 89–90.
75 The reading-in in this instance had the effect of carving out an exception to the impugned provisions which allowed for the personal use, possession and cultivation of cannabis in private.
cannabis in private for their personal consumption. Secondly, the use of cannabis in public or in the presence of children or non-consenting adult persons is not permitted; thirdly, the use or possession of cannabis in private other than by an adult for their personal consumption in private is not permitted; and finally, the cultivation of cannabis by an adult in a private place for their personal consumption in private was no longer a criminal offence.

Recognising the difficulty this could pose for a police officer who finds a person in possession of cannabis, the Court attempted to provide guidelines on how to ascertain whether the drug was for personal consumption or not.\(^{76}\) While recognising that this interim reading-in may create some uncertainty, the Court suggested that policing the exception was manageable and no greater a burden than that connected with an offence such as negligent driving.\(^{77}\) Parliament had a duty to cure the constitutional defect within 24 months – if it failed to do so, the Court held that its reading-in to the legislation would become final.

**IV PRINCE III: A CRITICAL ANALYSIS**

Having summarised *Prince III*, it was clear that although a unanimous outcome had been reached, there are a number of gaps in the Court’s reasoning. This is not a new problem with the Court’s jurisprudence. The Court has often been criticised for providing insufficient reasoning for the conclusions it reaches.\(^{78}\) South African constitutional law scholars have offered many theories and reasons for the Court’s minimal decision-making, some of which are briefly set out below.

Cockrell, in his analysis of the Court’s jurisprudence in its first year, described the Court’s ‘absence of rigorous jurisprudence of substantive reasoning’\(^{79}\) as ‘rainbow jurisprudence’.\(^{80}\) Characteristics of this include making broad references to the constitutional values of dignity, equality and freedom and identifying the necessity of substantive reasoning in making decisions,\(^{81}\) but failing to engage in moral and political reasoning in order to do so.\(^{82}\) Currie has classified this as a form of judicial decisional minimalism or more accurately, ‘judicious avoidance’\(^{83}\) — a way for the Court to say no more than is necessary to justify an outcome and not deciding things that it does not have to.\(^{84}\) Currie posits a number of reasons that would justify this approach: these include that in multi-member panels, it is easier for such panels to agree on the outcome of a case rather than the reasons for it, especially where such reasoning would entail having to go beyond deferring to set rules.\(^{85}\)

Other authors have characterised the Court as taking a pragmatic approach: issuing decisions that pay heed to the specific facts, without making general pronouncements and allowing it to

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\(^{76}\) *Prince III* (note 1 above) at paras 113–114.

\(^{77}\) Ibid at para 117. The Court also provides other examples, such as offences related to stock theft and the sale of liquor by a person who is not the holder of a liquor licence.


\(^{80}\) Ibid.

\(^{81}\) Ibid.

\(^{82}\) Ibid at 18.


\(^{84}\) Ibid at 142. Currie notes that this theory is influenced by the work of Cass Sunstein, see fn 17 at 142.

\(^{85}\) Ibid at 147–148.
consider the social and political ramifications of a decision.\textsuperscript{86} Whatever the justification for this approach, it has led to a number of problems:\textsuperscript{87} a failure for meaningful predictive principles to be drawn from judgments; it becomes difficult for a party to anticipate what forms of law or conduct are consistent with the Bill of Rights; it undermines other branches complying with the Bill of Rights; and it can undermine the integrity of the legal system in that there is a failure to create coherent jurisprudence.\textsuperscript{88} 

This case comment argues that some of the characteristics of judicial minimalism can be seen in \textit{Prince III}, namely, incomplete and incoherent reasoning and a focus on the outcome. The reasoning can be seen to be troubling in two specific aspects: the lack of adequate reasoning in relation to the nature and scope of the right to privacy and an articulation of what being ‘in private’ entails; and a limited and incomplete limitations analysis. Arguably, this leads to an insufficiently justified conclusion. In addition, the Court’s limited approach results in a finding that is narrower than what the constitutional rights demanded: a full decriminalisation — which included the dealing and sale of cannabis. I now turn to consider each of these flaws in the reasoning.

A First stage: the lack of development of the right to privacy

Under South African law, a two-stage approach is adopted in relation to constitutional analysis of a right. The first stage involves a rights analysis, and the second stage involves a limitations analysis as required by s 36(1) of the Constitution.\textsuperscript{89} The two-stage analysis is designed specifically to ensure that all competing rights and interests are given the consideration that they deserve.\textsuperscript{90} 

During the first stage, a court must determine the scope of the right in question through a process of interpretation, and must ask whether or not the right has been infringed by the law under scrutiny.\textsuperscript{91} In doing so, a court must determine whether the Bill of Rights protects a particular interest of the applicant, and if so, it must then determine whether the law or conduct in question impairs that interest.\textsuperscript{92} The onus in this regard is on the applicant(s) to show that a right has been infringed.\textsuperscript{93} It is only after a proper rights analysis has been done and it has been found that the provision infringes the right that a limitations analysis can be undertaken. Here the question is asked whether or not the infringement/limitation of the right in question is permissible in terms of s 36 (1) of the Constitution and the onus is on the respondent to show that the limitation is in fact permissible.\textsuperscript{94} The reason for this two-stage


\textsuperscript{87} Woolman (note 78 above) 785.

\textsuperscript{88} Ibid at 786.


\textsuperscript{91} Currie & De Waal (note 89 above) at 153.

\textsuperscript{92} Ibid at 26.

\textsuperscript{93} Ibid at 153.

\textsuperscript{94} Ibid at 153. See below for a fuller excursus of what constitutes a limitations analysis.
approach to rights reasoning is that it is necessary to understand the harm to the right and the interests it protects before considering possible reasons for its limitation.95

In Prince III, the Court concluded that the right to privacy is infringed by laws that criminalise the possession, use and cultivation of cannabis. Had the right been similarly infringed by provisions that criminalised the purchase and dealing in cannabis? The Court had little to say about this latter question. In this comment I attempt to highlight the Court’s deficiencies in defining the scope and content of the right to privacy, especially regarding what it means to use, possess and/or cultivate of cannabis in private for personal consumption. In exposing the deficiencies I draw on the jurisprudence and sources that the Court should have relied on to extend its reasoning. This includes arguing that the Court should have potentially relied on the relationship between the right to privacy and other constitutional rights. The aim in doing so is to highlight that Prince III does not adequately address the scope of the right to privacy, and so fails to provide a clear delineation of where the protection it offers begins and ends.

1 An elision between ‘at home’ and ‘in private’

The High Court judgment defined the scope of the right to privacy implicated in this matter as follows:

If privacy, considered to be analysed as a continuum of rights which starts with an inviolable inner core moving from the private to the public realm where privacy is only remotely implicated by interference, it must follow that those who wish to partake of a small quantity of cannabis in the intimacy of their home do exercise a right to autonomy which, without clear justification, does not merit interference from the outside community or the State.96

The focus of the High Court judgment was on the privacy of the home. The Court attempted to go beyond the High Court’s scope of the protection to include all use ‘in private’, yet it failed to clearly articulate what ‘in private’ means. The pornography analogy used by the Court (in Case) focuses on the right to be left alone in one’s home. Similarly, in its use of the Ravin case, it reiterated that the protection afforded by the right to privacy in respect of the use and possession of cannabis was only with respect to privacy within the home. The Court, however, used these cases to provide support for its proposition that the right to privacy provides protection for the individual to possess, use or cultivate cannabis in private beyond the home as well. There is no clear justification for why the right to privacy includes protection for such an extended scope. However, I am of the view that a fuller understanding of the right to privacy, drawing from its own jurisprudence, would have given the Court the proper basis to reach this conclusion.

The incongruence in the Court’s reasoning and its lack of rootedness in a richer conception of the right to privacy is highlighted later in the judgment when the Court has to craft its interim relief and clarify what it meant by ‘use, possession and cultivation in private for personal consumption’.97 The Court outlined some guidelines but it did not adequately provide the basis for the guidelines.

Given the Court’s rich jurisprudence with respect to the content of the right to privacy, it is unclear why the Court did not engage in a more thorough analysis of the scope of the right. Such analysis would have provided it with the building blocks necessary to adequately justify its

95 Bilchitz (note 90 above) 573.
96 High Court judgment (note 18 above) at para 25.
97 Prince III (note 1 above) at para 101.
conclusions. I will now examine the resources the Court had from its previous jurisprudence to clarify the scope and content of the right to privacy and how it applied that to the case at hand.

2 Reconstructing the Court’s reasoning

The constitutional protection of the right to privacy enshrined in s 14 of the Constitution offers two levels of protection. Section 14 provides as follows:

Everyone has the right to privacy, which includes the right not to have —
(a) their person or home searched;
(b) their property searched;
(c) their possessions seized; or
(d) the privacy of their communications infringed.

The first level of protection is a general protection of privacy. The second provides protection against specific infringements of the right to privacy relating to protection of bodily integrity and property, and the protection of informational rights.98 Section 39 of the Constitution provides that the content and the scope of the rights enshrined in the Bill of Rights should be interpreted in light of the constitutional values of openness, democracy, human dignity, freedom, and equality — these values animate the entire constitutional enterprise.99

At a base level, the right to privacy is understood and articulated as the right to be left alone in one’s home, free from intrusions and interference from the state or any party.100 It is this base concept of the right to privacy which appears to be the minimalist basis upon which the Court founded its reasoning in Prince III. However, according to Ackermann J, the seminal case with respect to the constitutional right to privacy — the Bernstein case — widens the scope of this protection, describing the right to privacy as being ‘amorphous and elusive’101 and not being ‘absolute’.102 As such, it cannot only encompass the right to be left alone in one’s home. This is evident in the way that Ackermann J attempted to provide a helpful way to articulate the scope of the right to privacy.103

Ackermann J held that the scope of a person’s privacy extends only to those aspects in regard to which a legitimate/reasonable expectation of privacy can be harboured.104 The decision provides guidance as to the extent of this legitimate expectation. According to Ackermann J, privacy interests are stronger the closer the expectation of privacy is to one’s inner sanctum.105 However, as a person moves more into a communal or public realm, the expectation of privacy

98 Currie & De Waal (note 89 above) at 294.
100 Currie & De Waal (note 89 above) at 295.
101 Bernstein (note 24 above) at para 65.
102 Ibid at para 67.
103 Ibid.
104 Ibid at para 71. One of those aspects identified by Ackerman J is the concept of identity (at para 65). Currie & De Waal (note 89 above) at 299 summarise Ackermann J’s reasoning as follows: ‘[P]rivacy is a subjective expectation of privacy that is reasonable; b) it is reasonable to expect privacy in the “inner sanctum”, in the “truly personal realm”. In order to understand when it is reasonable to expect privacy, one must identify the value that privacy is expected to protect. In this instance, the protected “inner sanctum” helps to achieve a valuable good — one’s own autonomous identity.
105 Bernstein (note 24 above) at para 67.
must be balanced against the ‘conflicting rights of the community’. Ackermann J ultimately concluded that not every activity or experience that could notionally count as private deserves constitutional protection. The following quote from Bernstein summarises these points:

In the context of privacy this would mean that it is only the inner sanctum of a person, such as his/her family life, sexual preference and home environment, which is shielded from erosion by conflicting rights of the community. This implies that community rights and the rights of fellow members place a corresponding obligation on a citizen, thereby shaping the abstract notion of individualism towards identifying a concrete member of civil society. Privacy is acknowledged in the truly personal realm, but as a person moves into communal relations and activities such as business and social interaction, the scope of personal space shrinks accordingly.

Subsequent cases have adopted the conception of the right to privacy as existing along a spectrum. In Mistry, the Court characterised the content of the right to privacy as a ‘continuum of privacy rights which may be regarded as starting with a wholly inviolable inner self, moving to a relatively impervious sanctum of the home and personal life and ending in a public realm where privacy would only remotely be implicated’. The Court in Mistry held that, to the extent that a statute authorises warrantless entry into private homes and rifling through intimate possessions, such a statute would breach the right to personal privacy.

In National Coalition, the Court highlighted a further element of the right to privacy: the link between privacy and the right to personal autonomy. Ackermann J held that the right to privacy recognises an individual’s right to a sphere of private intimacy and autonomy. In a separate concurring judgment, Sachs J reiterated that the protection afforded by privacy is related to people, not places. He also considered the intertwining of the right to equality and the right to privacy, noting that a single situation can give rise to multiple, overlapping and mutually reinforcing violations of constitutional rights. Sachs J also reinforced autonomy as a central part of privacy, and went further in stating that the state must ‘promote conditions in which personal self-realisation can take place’. However, Sachs J noted that the right to privacy is not isolated and the context in which this right is enjoyed must be considered: ‘There must be a balancing between respect for an individual’s privacy and respect for social standards’.

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107 Ibid. The Court in Prince III however only considered this dictum when referencing National Coalition for Gay and Lesbian Equality v Minister Of Justice [1998] ZACC 15; 1999 (1) SA 6 (CC)(National Coalition) and its discussion of the right to privacy, and not in the context of it being an important articulation of the scope of the protection afforded by the right to privacy.
108 In Mistry v Interim National Medical and Dental Council & Others [1998] ZACC 10; 1998 (4) SA 1127 (CC) (‘Mistry’) the Court had to consider the constitutionality of s 28(1) of the Medicines Act which gives inspectors of medicines the authority to enter into and inspect any premises, place, vehicle, vessel or aircraft where such inspectors reasonably believe there are medicines or other substances regulated by the Act, and to seize any medicine or any books, records or documents found in or upon such premises, place, vehicle, vessel or aircraft which appear to afford evidence of a contravention of any provision of the Medicines Act.
109 Ibid at para 27.
110 Ibid at para 16. See also McQuoid-Mason (note 106 above) at 38-29.
111 National Coalition (note 107 above) at para 32.
112 Ibid at 116.
113 Ibid at para 114.
114 Ibid at para 116.
115 Ibid at para 119.
Langa DP in *Hyundai* also wove the conceptions of privacy as being linked to social interactions and personal autonomy. He stated:

The right [to privacy], however, does not relate solely to the individual within his or her intimate space. Ackermann J [in *Bernstein*] did not state in the above passage that when we move beyond this established ‘intimate core’, we no longer retain a right to privacy in the social capacities in which we act. Thus, when people are in their offices, in their cars or on mobile telephones, they still retain a right to be left alone by the state unless certain conditions are satisfied. Wherever a person has the ability to decide what he or she wishes to disclose to the public and the expectation that such a decision will be respected is reasonable, the right to privacy will come into play.\(^{116}\)

In *Magajane*,\(^{117}\) the Court spoke of ‘a series of concentric circles ranging from the core most protected realms of privacy to the outer rings that would yield more readily to the rights of other citizens and the public interest’.\(^{118}\) The Court in that instance had to interpret the right to privacy of an unlicensed business and held that a business’s ‘expectation of privacy will be more attenuated the more the business is public, closely regulated and potentially hazardous to the public’.\(^{119}\)

Having briefly explored some of the fundamentals of the Court’s privacy jurisprudence thus far, it is possible to identify how the Court failed to offer a more fulsome description of the right to privacy assessed against the circumstance in *Prince III*. The first step missing from the Court’s analysis of the content of the right to privacy is the failure to deal with the question whether an adult who uses, possesses and cultivates cannabis has a legitimate expectation of privacy. In answering this question, the Court should have determined — consistent with its past jurisprudence — whether the use, possession, cultivation and sale of cannabis falls within the inner sanctum and at which point (if at all) these activities generate a more attenuated interest which must be weighed against the conflicting rights and interests of other citizens and the public interest more generally.

We saw that the Court attempted to draw an analogy between the right to use, possess and cultivate cannabis in private and the right to consume and possess pornography within the home. However, this approach tied privacy to the basic conception of the right to be left alone, specifically in the home.\(^{120}\) This displays a limited understanding of privacy as being tied to a specific space, namely the territorial integrity, the sanctity of the home. Yet, the Court in *Prince III* went beyond the High Court judgment and allowed the use, possession or cultivation of cannabis in private beyond the sphere of the home. Since the justification presented by the Court in the judgment did not provide adequate support for this position, on what basis could it have done so?

I would argue that there are two resources that the Court inadequately relied on to support this position.\(^{121}\) The first relates to the Court’s continuum conception of privacy jurisprudence which would have allowed the Court to argue that the right to privacy extends beyond the

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\(^{117}\) *Magajane v Chairperson, North West Gambling Board* [2006] ZACC 8; 2006 (5) SA 250 (CC).

\(^{118}\) Ibid at para 42.

\(^{119}\) Ibid at para 50.

\(^{120}\) *Bernstein* (note 24 above) at para 67.

\(^{121}\) While there are many other resources that the Court inadequately relied on, given the limitations of this case comment, I have decided to focus only on two.
home. However, the strength of the interest becomes more attenuated the closer you move into the public sphere and the more increased social interaction you have. That could have explained, for instance, the distinction between personal use, enjoyment and commercial dealing. The Court, in prior cases such as Magajane, envisaged that businesses have a claim to privacy but that because of the transactional nature of their operations the claim is more attenuated. That would have allowed a more principled engagement with whether individuals can claim a right to sell and deal in cannabis as part of their right to privacy.\textsuperscript{122} An adult would have reduced legitimate expectation of privacy the greater the impact or relationship their use, possession and cultivation of cannabis has on other individuals.

The second dimension that the Court could have utilized would have been the link it drew in its jurisprudence between privacy rights and protecting personal autonomy.\textsuperscript{123} The Court could have drawn on Bernstein and Sachs J’s judgment in National Coalition, each of which reiterate the link between privacy and autonomy:

In Bernstein and Others v Bester and Others NNO Ackermann J pointed out that the scope of privacy had been closely related to the concept of identity and that rights, like the right to privacy, are not based on a notion of the unencumbered self, but on the notion of what is necessary to have one’s autonomous identity … . Viewed this way autonomy must mean far more than the right to occupy an envelope of space in which a socially detached individual can act freely from interference by the state. What is crucial is the nature of the activity, not its site.\textsuperscript{124}

Drawing from the above, I argue that personal autonomy permits individuals to make decisions about themselves without interference, especially where this is done with limited or no impact on the lives of others. Accordingly, it could well be argued that an individual can hold a legitimate expectation of privacy with respect to what they ingest in their body irrespective of where that takes place. This linking of recreational cannabis use to personal autonomy has been made in other jurisdictions, with the caveat that there should be no harm caused to others.\textsuperscript{125} In fact, the High Court found convincing the similar argument used by the minority judgment in R v Malmo-Levine\textsuperscript{126} and the Court could have affirmed this. It is on the back of this caveat that the Court could have reached the conclusion that a legitimate expectation of protection exists with respect to the ability to use, possess and cultivate cannabis in private for personal consumption.

Having examined the lack of development of the right to privacy and the failure of the Court to draw on developing conceptions of the right to privacy and its own jurisprudence, I

\textsuperscript{122} It may well be that another right would have been better placed to capture the interest in this regard.

\textsuperscript{123} AD Moore ‘Privacy: Its Meaning and Value’ (2003) 40 American Philosophical Quarterly 215, 218 advocates for the following view: ‘A right to privacy can be understood as a right to maintain a certain level of control over the inner spheres of personal information and access to one’s body, capacities and powers’. McQuoid-Mason (note 106 above) at 38-22 states: ‘Personal autonomy privacy rights permit individuals to make important decisions about their lives without interference by the state.’

\textsuperscript{124} National Coalition (note 107 above) at para 117.

\textsuperscript{125} Most recently, the Mexican Supreme Court purported to make this argument. The First Chamber held that the fundamental right to the free development of the personality allows the persons of legal age to decide — without any interference — what kind of recreational activities they wish to carry out and protect all the actions necessary to materialize that choice. See C Ingram ‘Mexico’s Supreme Court Overturns Country’s Ban on Recreational Marijuana’ The Washington Post (1 November 2018), available at https://www.washingtonpost.com/business/2018/11/01/mexicos-supreme-court-overturns-countrys-recreational-marijuana-ban/.

\textsuperscript{126} R v Malmo-Levine; R v Caine (note 31 above).
will now examine a further failure of the Court to draw on other rights in the Constitution, specifically, the right to dignity.

2 Potential use of other rights?

As noted above, despite the respondents averring that a number of their constitutional rights had been infringed, the High Court judgment limited the rights considered to the right to privacy. In the Court, the respondents cross-appealed this, noting that a number of rights were infringed by the impugned provisions, including the right to equality, dignity and freedom. The respondents in their submissions also argued that decisional autonomy is a part of privacy, linking dignity and the right to freedom of movement. This goes to a further missed opportunity of the Court: its sole reliance on privacy being the only right that was infringed.

In National Coalition, both the majority of Ackerman J and the minority of Sachs J recognised that rights cannot be considered in isolation, especially within the context of privacy. Ackerman J held that the offence of sodomy was unconstitutional because it breached the rights of equality, dignity and privacy.127 Ackerman J dealt with the infringement of each of these rights in turn in his judgment and also noted that ‘in particular circumstances, the rights of equality and dignity are closely related, as are the rights of dignity and privacy’.128 Sachs J, in his separate concurrence, noted that ‘a single situation can give rise to multiple, overlapping and mutually reinforcing violations of constitutional rights’.129 Sachs J went further to note that in the context of the unconstitutionality of the crime of sodomy, the right to dignity linked the other protections and rights in the Bill of Rights.130 The right to dignity is, at least partly, about realising individual autonomy, and could have bolstered this dimension of the Court’s reasoning.

The question that might be asked though is whether the failure to consider other rights matters. While it may not have altered the outcome in relation to use, possession and cultivation in private, it may have led to an analysis of the impact of the ban on the sale and dealing in cannabis on other rights. Clearly, the prohibition will increase the frequency with which individuals are criminally prosecuted and sanctioned. However, for some individuals, dealing in cannabis is a source of livelihood and, in a context of widespread unemployment, can have

127 National Coalition (note 107 above) at para 30.
128 Ibid.
129 Ibid at para 114.
130 Ibid at para 120. The applicants in National Coalition had argued that the criminalisation of sodomy infringed the rights to privacy, equality and dignity. In Prince III, the respondents also made the argument that the criminalisation of the private use of cannabis violated the right to equality (s 9 of the Constitution). This argument was made with reference to an essay written by Paul-Michael Keichel, a law student at Rhodes University in 2009, entitled ‘A Critical Analysis of Prince and an Objective Justification for the Decriminalisation of Marijuana in South Africa’. Keichel argued that a stronger basis for decriminalisation is to apply the test for unfair discrimination emanating from Harksen v Lane NO [1997] ZACC 12; 1998 (1) SA 300 (CC). With reference to two legal drugs, alcohol and tobacco, Keichel applies the Harksen Test to the prohibition of the recreational use of cannabis. He found that at the first level, recreational cannabis users are treated differently to recreational tobacco and alcohol users since the former are criminalised and the latter are not. Thus, according to Keichel, the prohibition of cannabis would only be legitimate if the state also prohibited tobacco and alcohol. Based on this, recreational use of cannabis should be decriminalised (i.e., s 4 of the Drugs Act should be declared unconstitutional). At the second level of the Harksen Test, Keichel argues that even if one assumes that there is a legitimate objective for the prohibition, it must be asked whether criminalising cannabis use achieves what it is designed to do. Keichel argues that a strong case can be made that cannabis is at the very least comparable if not less harmful than alcohol and tobacco. Accordingly, it should be decriminalised.
an effect not only on the right to freedom of occupation but also access to housing, food and other socio-economic rights. An example of this is found in the case of cannabis growers in Pondoland in rural Eastern Cape, an area which has remained economically underdeveloped. Families in this area have grown and sold cannabis for generations, and as a result, have been subject to police persecution in various forms. With the decriminalisation of the cultivation of cannabis for personal use but the continued criminalisation of the sale and dealing in cannabis, there are concerns amongst the community that their livelihood may continue to be impacted as people may be more likely to grow their own cannabis. The limited rights framework used in *Prince III* meant that the Court was able to avoid important issues that were before it and were therefore not adequately addressed.

I have thus far sought to show how the Court failed to adequately analyse the infringement of rights that the existing criminal law relating to cannabis involved. I now turn to the second prong of my critique: the failure to conduct an adequate limitations analysis.

**B Second stage: inadequate limitations analysis**

As noted above, in order to pass constitutional muster, a limitation — in this instance the impugned provisions — must meet the requirements of s 36(1) of the Constitution. Section 36(1) of the Constitution provides as follows:

(1) The rights in the Bill of Rights may be limited only in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including –

(a) the nature of the right;
(b) the importance of the purpose of the limitation;
(c) the nature and extent of the limitation;
(d) the relation between the limitation and its purpose; and
(e) less restrictive means to achieve the purpose.

In *S v Makwanyane* the Court noted that the test prescribed by the limitations clause in the Interim Constitution (which closely mirrors s 36(1) of the final Constitution) was essentially a proportionality test and involved a balancing of interests:

The limitation of constitutional rights for a purpose that is reasonable and necessary in a democratic society involves the weighing up of competing values, and ultimately an assessment based on proportionality. This is implicit in the provisions of section 33(1). The fact that different rights have different implications for democracy, and in the case of our Constitution, for ‘an open and democratic society based on freedom and equality’, means that there is no absolute standard which can be laid down for determining reasonableness and necessity. Principles can be established, but the application of those principles to particular circumstances can only be done on a case by case basis. This is inherent in the requirement of proportionality, which calls for the balancing of

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133 *S v Makwanyane & Another* [1995] ZACC 3; 1995 (3) SA 391.

134 The Interim Constitution has been repealed.
different interests. In the balancing process the relevant considerations will include the nature of the right that is limited and its importance to an open and democratic society based on freedom and equality; the purpose for which the right is limited and the importance of that purpose to such a society; the extent of the limitation, its efficacy and, particularly where the limitation has to be necessary, whether the desired ends could reasonably be achieved through other means less damaging to the right in question.\(^{135}\) (Footnotes omitted.)

As summarised subsequently in *S v Bulwana*,\(^ {136}\) when conducting a proportionality assessment, a court must place ‘the purpose, effects and importance of the infringing legislation on one side of the scales and the nature and effect of the infringement caused by the legislation on the other. The more substantial the inroad into fundamental rights, the more persuasive the grounds of justification must be.’\(^ {137}\)

Courts have however recognised that the factors listed in s 36(1) are not exhaustive, and that the Court must conduct a holistic proportionality assessment involving the weighing up of competing rights, values and interests.\(^ {138}\) However, when conducting a limitations analysis, the Court increasingly has considered each of the factors separately, and in many instances not undertaken a global, holistic proportionality analysis.\(^ {139}\) Arguably, a proportionality analysis must involve both a focus on individual factors, as well as an holistic assessment. The limitation test prescribed by s 36(1) requires an assessment of whether a law that restricts a fundamental right does so for reasons that are reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom. In addition, the assessment must determine whether the law is reasonable in that it does not invade rights any further than it needs to in order to achieve its purpose. To satisfy this test, the harm done by the law, that is, the infringement of fundamental right must be proportional to the purpose it is designed to achieve.\(^ {140}\) While considering each of the factors separately allows a court to consider vital features of each factor, an holistic proportionality analysis will sum the relevant factors on either side of the scales.

In this part of the comment, I argue that in *Prince III*, the Court failed properly to address and distinguish a number of the most important factors and that this, ultimately, both affected the outcome of the case negatively as well as its ability to provide guidance on important matters relating to drug policy for the future.

\[^{135}\] Ibid at para 104.
\[^{137}\] Ibid at para 18.
\[^{138}\] See *Prince II* (note 10) at para 45. See also Bilchitz (note 88 above) and I Currie ‘Balancing and the Limitation of Rights in the South African Constitution’ (2010) 25 *South African Public Law* 408. In *National Coalition* (note 107 above), the Court held at para 35 that: ‘The balancing of different interests must still take place. On the one hand there is the right infringed; its nature; its importance in an open and democratic society based on human dignity, equality and freedom; and the nature and extent of the limitation. On the other hand, there is the importance of the purpose of the limitation. In the balancing process and in the evaluation of proportionality one is enjoined to consider the relation between the limitation and its purpose as well as the existence of less restrictive means to achieve this purpose.’
\[^{139}\] See for example, *Mlungwana v S* [2018] ZACC 45; 2019 (1) SACR 429 (CC) at paras 57–100; and *Nandutu & Others v Minister of Home Affairs & Others* [2019] ZACC 24; 2019 (5) SA 325 (CC) at paras 70–79.
\[^{140}\] Currie & De Waal (note 89 above) at 153.
1 Section 36(1)(c): the nature and extent of the limitation

I first want to consider the Court’s approach to determining the nature of the extent of the limitation of the right. The Court held that the limitation of the right to privacy in this case was quite invasive.\(^{141}\) Unfortunately, it did not provide reasons for why it was invasive.

Woolman et al note that the consideration of the nature and extent of the limitation ‘lies at the core of the approach to balancing and to proportionality’\(^{142}\), and further, that there are five factors that a court assesses when considering the nature and extent of a limitation.\(^{143}\) In analysing the nature and extent of the limitation imposed by the impugned provision, the Court ought to have considered two of those factors which could have strengthened its case for unconstitutionality. First, the Court should have considered whether the limitation affects the core values underlying the particular right in question, that is, the right to privacy. Had it outlined the parameters of the right to privacy clearly, and specifically identified the right to autonomy, and the right to do with one’s body as one wishes free from state interference (especially where such activity is not harmful) at the core of the right to privacy,\(^{144}\) the Court could have shown why there was a significant burden on the state to justify the criminal provisions under scrutiny.

Second, the respondents provided the Court with anecdotal evidence of the effect of the impugned provisions on their lives, including constant search and seizures, and deprivation of liberty in the form of incarceration.\(^{145}\) These anecdotal pieces of evidence provided the opportunity to assess the full impact of the criminal prohibition. Having ignored this evidence, the Court failed to consider the disproportionate means of punishment caused by the impugned provisions. They have resulted in criminal records for possession of small amounts of cannabis that were not harmful, and in the case of Prince himself, deprived him of the vocation of his choice.\(^{146}\) Had the Court engaged in an analysis of the real effects of the impugned provisions on the lives of those affected, it would then have recognised the real harms caused to people by the provisions.\(^{147}\)

It also failed to consider the impact of the prohibition on the sale and dealing in cannabis on the lives of individuals — if there were a \textit{prima facie} violation of individual rights in this regard, arguably, such criminalisation too could have significant negative impacts on individuals through preventing them from exercising an occupation and, in some cases, earning a livelihood that enabled them to realise some of their socio-economic needs.

\(^{141}\) \textit{Prince III} (note 1 above) at para 66.

\(^{142}\) Woolman & Botha (note 99 above) at 34-79.

\(^{143}\) Woolman & Botha (note 99 above) at 34-79–34-83 note that there are five factors that the Court considers when considering the nature and extent of a limitation: 1) whether the limitation affects the core values underlying a particular right; 2) an assessment of the actual impact of the limitation on those deleteriously affected by it; 3) the social position of individuals or a group concerned; 4) whether the limitation is permanent or temporary, and whether it amounts to a complete or a partial denial of the right in question; and 5) whether the limitation is narrowly tailored to achieve its objective.

\(^{144}\) See above at part IVA.

\(^{145}\) Respondents’ application to cross-appeal (On file with the author).


2 Section 36(1)(b): the importance of the purpose of the limitation

When identifying the importance of the purpose of the limitation, the Court held that the purpose of the impugned provisions was to reduce the harm of a dependence-producing substance.\textsuperscript{148} The Court also alluded to the High Court’s consideration of the criminalisation of cannabis being linked to a history ‘replete with racism’,\textsuperscript{149} but did not develop the analysis in this regard. Arguably, this was a failure by the Court fully to contextualise the criminalisation of cannabis and its impact on black South Africans especially. The Court, like the High Court judgment, merely quoted from a portion of the judgment \textit{S v Nkosi},\textsuperscript{150} where the court in that instance recognised that cannabis had been used by black South Africans for a variety of reasons, including for food and medicinal reasons.\textsuperscript{151} The quote, however, suggested that cannabis has a history of racially disparate use and enforcement. Neither the High Court nor the Court, however, drew on the history of the criminalisation of cannabis in South Africa which had its roots in colonial and apartheid methods of subjugation of black South Africans.\textsuperscript{152}

Indeed, if part of the goal of criminalisation was to further subjugate black South Africans, and this prohibition was part of the racist architecture of the apartheid state, then, it would have raised significant questions about the very legitimacy of these provisions now.

3 Sections 36(1)(d) and (e) of the Constitution — the relation between the limitation and its purpose and the less restrictive means to achieve this purpose

Section 36(1)(d) and (e) of the Constitution requires an evaluation of two separate issues. Section 36(1)(d) requires an evaluation of whether or not the means employed — that is, the operation of the impugned provisions — are rationally connected to, or capable of fulfilling the purpose of the limitation.\textsuperscript{153} This is often referred to as the ‘suitability’ test\textsuperscript{154} or ‘rational connection’\textsuperscript{155} test in other jurisdictions. Section 36(1)(e) requires a different enquiry. Assuming that there is a rational connection between the means employed and the objective, the Court will then consider whether there is a less restrictive, alternative means, to achieve the purpose. This dimension of proportionality is often referred to as the ‘necessity’\textsuperscript{156} test or ‘minimum impairment’\textsuperscript{157} enquiry. Unfortunately, in this case, the Court did not distinguish its reasoning in relation to these distinct tests and, instead, conflated the two. That, in turn, lead to a significant lack of clarity in its reasoning.

Having previously identified the main purpose of the impugned provisions to be the prevention or reduction in harm caused by dependence-producing drugs, the Court outlined evidence presented by the state of the harm caused by cannabis, including psychological and physical harm. The Court then went on to refute this evidence by noting the dictum from

\textsuperscript{148} \textit{Prince III} (note 1 above) at paras 63–64.
\textsuperscript{149} Ibid at para 65.
\textsuperscript{150} \textit{S v Nkosi & Others} 1972 (2) SA 753 (T).
\textsuperscript{151} Ibid at 762A–B.
\textsuperscript{152} T Waetjen ‘South African Court Frees Cannabis from Colonial and Apartheid Past’ \textit{The Conversation} (23 September 2018). It is beyond the scope of this case comment to critically engage with the methods employed by the colonial and apartheid forces. For a fuller discussion of this, see H Crampton \textit{Dagga: A Short History} (2015).
\textsuperscript{153} Woolman & Botha (note 99 above) at 34-84.
\textsuperscript{156} Alexy (note 154 above) at 68.
\textsuperscript{157} Oakes (note 155 above) at para 70.
the minority in *Prince II* that there is a level of consumption of cannabis that is safe and that is unlikely to pose any risk of harm.\(^{158}\) Further, the Court was also quick to point out sources indicating that the consequences of cannabis use are often less severe than in relation to those addicted to alcohol and opioids which are not prohibited by criminal law.\(^{159}\) This lead the Court to the conclusion — drawing on *Ravin* and *Prince II* — that the limitation was over-broad. While it achieved its (legitimate) goal of preventing the abuse and trafficking of dependence-producing drugs, the limitation was so broad as to prohibit the use of cannabis that was not harmful, and accordingly this was not reasonable.\(^{160}\)

It is unclear, however, why this reasoning does not also apply to decriminalising the purchase and sale of cannabis, if there exists a level of cannabis use that is not harmful. As such, allowing the purchase of such an amount of cannabis would not affect the purpose of the state — it would simply justify the regulation of the cannabis industry in the same way that there exists extensive regulation in the sale and purchase of alcohol. Indeed, the position of the Court is strange in that cultivation of cannabis is likely only to be possible for a limited number of South Africans. Prohibiting the purchase and dealing in cannabis would thus effectively prevent many people from choosing to utilise cannabis. It remains unclear why the Court chose to retain the prohibition on purchase and dealing in cannabis. It simply stated that ‘[d]ealing in cannabis is a serious problem in this country and the prohibition of dealing in cannabis is a justifiable limitation of the right to privacy’.\(^{161}\) This is ultimately an assertion without a justification and its reasoning in this regard is inadequate.

The Court also failed to adequately consider whether there are less restrictive means that could be adopted in relation to the purchase and dealing in cannabis (or for that matter measures short of criminalization in relation to private use). What is missing is a recognition of the serious harm caused by incarcerating people involved in the sale or purchase of cannabis. A proper consideration of alternatives to criminalisation could also have recognised the legitimate interest of the state in preventing the harms drugs can cause and allowed the legislature the room to consider measures such as mandatory drug treatment\(^{162}\) and increased preventative drug education in school.\(^{163}\)

The conflation of factors in the proportionality enquiry is not only important for purposes of academic rigour — it also has real consequences when the Court then fails to distinguish between or identify important issues that require consideration. Does criminalisation contribute towards reducing drug dependency or usage? The Court did not engage with this enquiry. What alternatives exist to criminalisation? There is hardly any consideration of this matter. Is there a good reason to distinguish between personal cultivation and the sale of cannabis? The Court suggested so but did not provide proper reasoning. These questions highlight that the Court missed opportunities to engage with important substantive questions that have a

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\(^{158}\) It is interesting to note that the Court in *Prince III* adopted much of the reasoning provided by the minority judgment in *Prince II* in reaching its outcome. In doing so, the Court distanced itself from the majority in *Prince II* without actually overruling *Prince II*. Unfortunately, it falls beyond the scope of this case comment to fully canvas this issue.

\(^{159}\) *Prince III* (note 1 above) at para 69.

\(^{160}\) *Prince II* (note 10 above) at paras 81–82.

\(^{161}\) *Prince III* (note 1 above) at para 87.

\(^{162}\) High Court judgment (note 18 above) at para 57.

\(^{163}\) Ibid at para 61.
significant impact on individual lives. It also, of course, would then have offered a stronger justification for its preferred outcome.

V CONCLUSION

In this case comment, I have argued that the Court failed to conduct an adequate rights analysis and the limitations analysis under s 36(1) of the Constitution. While we are left with an outcome that appears consistent with a trend across the world to decriminalise the private consumption of cannabis, sadly, the actual reasoning of the Court in getting there was disappointing. I have argued that this has resulted in too narrow an outcome with a failure adequately to justify why a criminal prohibition on the purchase and sale of cannabis remained acceptable, with the serious impact it has on many lives. It, too, often failed adequately to engage with central questions that arise in relation to drug policy and could have provided a leading precedent globally. Most worryingly, the lack of adequate reasoning eroded one of the underpinnings of our constitutional democracy, namely, the creation of a culture of justification.\footnote{E Mureinik ‘A Bridge to Where? Introducing the Interim Bill of Rights’ (1994) 10 South African Journal on Human Rights 31, 32. In this seminal article, Mureinik posits the Constitution as a bridge from a culture of authority under the Apartheid regime to a culture of justification: ‘a culture in which every exercise of power is expected to be justified.’}
Constitutional Court Review

Instructions for Authors

The Constitutional Court Review (CCR) is an international journal of record that tracks the work of the Constitutional Court of South Africa. The long essays, replies, articles and case comments use recent decisions to navigate more general currents in the Court’s jurisprudence. The Journal follows a strict double-blind, peer-reviewed editorial process. The CCR invites contributions from outstanding scholars but also considers unsolicited submissions that fit with the aims and scope of the Journal. It is published annually.

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I. EDITORIAL POLICY

Submission of a manuscript implies that the material has not previously been published, nor is being considered for publication elsewhere. Contributions are accepted on the understanding that the authors have the authority for publication. Contributions must conform to the principles outlined in Ethical considerations in research publication <https://www.nisc.co.za/products/97/journals/constitutional-court-review>. The Journal has a policy of anonymous (double-blind) peer review. Authors’ names are withheld from referees; authors and the editors must ensure that any identifying material is removed from the manuscript. The Editor reserves the right to revise the final draft of the manuscript to conform to editorial (house style) requirements.

Articles accepted for publication will attract an article processing charge (APC) of ZAR 12 000 (excl. VAT). The Journal has an APC waiver policy for authors whose funding arrangements are inadequate to cover the amount of the APC. The APC waiver-policy and procedures for applying for a waiver can be found at <https://www.nisc.co.za/openaccess>. Applications, which are considered on a case-by-case basis, must be made prior to submission via email to <journals@nisc.co.za>. Note that the Journal has an annual quota for APC waivers. It may not be possible to accommodate all APC waiver requests made during the year.

I. CONTRIBUTION FORMAT & LENGTH

As a general rule, the Constitutional Court Review accepts submissions in the following formats:

• Lead Essays and Responses: Essay length will vary depending upon the nature of the contribution. We have had lead essays that range from 65 to 80 pages. Thus, these lead essays – commissioned as such – may run over 30 000 words. Responses to lead essays – commissioned as such – may range from 10 000 to 25 000 words. Replies have been, on occasion, longer than the Lead Essay.

• Articles: Articles, commissioned as such or received by open call, should fall within a range of 12 000 to 25 000 words. As with all pieces, exceptions can and will be made.

• Comments: The distinction between articles and case comments can be somewhat artificial. Case comments will often have a range and depth that outstrip articles (at which point we often call them articles.) However, for pieces that narrow their focus to a single case and its more limited ramifications, we would expect between 6 000 to 10 000 words.
Where exceptions are required, they will be negotiated between editors and authors. Consult recent copies of the journal at [https://www.nisc.co.za/products/97/journals/constitutional-court-review](https://www.nisc.co.za/products/97/journals/constitutional-court-review) for examples of each type of contribution.

### III. MANUSCRIPT PRESENTATION & SUBMISSION

Manuscripts should be emailed to the Editor-in-Chief, Professor Stu Woolman at: <stuart.woolman@wits.ac.za>

Manuscripts should be in English and prepared in MS-Word format. Submissions should include a title page (as a separate file) with the following information:

- **Title.** The title should be short and descriptive, bearing in mind the need for discoverability using standard search terms.
- **Abstract** of 200 to 300 words
- **Keywords.** These four to six terms can be single words or phrases of more than one word. However, phrases tend to be less helpful as search terms in isolating groups of similar articles because the phrases are often unique (to that particular piece). The keywords facilitate discovery of the article and so should be chosen with care. Keywords should not repeat words/terms that are already in the title, since the title will already be parsed by search engines.
- **Author details.** Full name, title, institutional (or other) affiliation(s), email address and ORCID if registered
- **Acknowledgements.** (e.g., ‘I thank X, Y, Z, the editors and anonymous reviewers for their helpful comments on this piece.’)

The body of the article should be in a separate document. Please remove names and other identifiers to facilitate anonymous peer review. Prepare the manuscript according to the format and style conventions below. Manuscripts that do not conform to the Journal’s style and format conventions may be returned to the author for remedy without further evaluation. In general, authors should strive to present their arguments clearly and should avoid repetition and padding. We ask authors to be ruthless with their own prose.

### IV. MAIN TEXT

The CCR house font style is Garamond size 11. Quotations of more than five lines/two sentences must be indented and in a smaller font size 10.

- Use UK English such as ‘s’ rather than ‘z’ spellings, eg recognise, nationalise.
- Numbers from one to ten are spelt out in words unless they refer to section or schedule numbers in statutes.
- Dates: 1 January 1999; the 1980s and 1990s (not 1990’s).
- Use per cent not % (e.g. eight per cent or 38 per cent).

1 **Subheading levels**

   - Level one heading: bold, all capitalised, numbered I, II, III etc.
   - Level two heading: bold, sentence case, numbered A, B, C etc.
   - Level three heading: italic, sentence case, numbered 1, 2, 3 etc.
   - Level four heading: plain, sentence case, numbered aa, bb, cc etc.
   - Level five heading: italic, sentence case, numbered i, ii, iii etc.
For example:

I  INTRODUCTION

A  Understanding what the Constitution requires

1  The meaning of the right to vote

   aa  Democracy and the right to vote

      i  South African cases

2.  Case law

Depending on author preference, it is possible to either include the full case name (excluding the citation) in the main body of the text the first time it is referred to, for example *Occupiers of 51 Olivia Road Berea Township and 197 Main Street Johannesburg v City of Johannesburg & Others* (*Olivia Road*), or to provide the full case name and citation in a footnote and refer only to the abbreviated case name in the main body of the text, for example *Olivia Road*.

3.  Statutes

The full name of the statute including its number and year needs to appear in the main text. In other words, *do not place the number and year of an Act in a footnote*. This can be followed by an abbreviation in brackets, e.g. Promotion of Administrative Justice Act 3 of 2000 (PAJA), subsequent references are to ‘PAJA’.

   Use ‘s’ or ‘ss’ (plural) instead of ‘section(s)’ unless it is the beginning of a sentence.

4.  Quotations

Quotations should be clearly indicated by *single quotation marks*, with double quotation marks used for quotes within quotes. Where a quotation is two sentences long or runs to more than five lines, it must be in a smaller font, indented as a separate paragraph, with a line space above and below, and with no quotation marks or leader dots. Pay attention to accuracy when quoting directly.

5.  Abbreviations

Abbreviations may be used for case names, e.g (*Olivia Road*). However, the case name must be set out in full with full double-barreled citation the first time it is referred to, followed by an italicised abbreviation in brackets. If a case is abbreviated in a footnote (rather than in the main text), it is preferable for it to appear at the end of the sentence. The abbreviation can then be used throughout the main text and for cross referencing purposes in footnotes, e.g the Court in *Olivia Road* held or the *Olivia Road* Court held.

   • Abbreviated references to legislation can also be used in the body of the text (e.g. PAJA, PAIA or the Administrative Justice Act, the Information Act).
   • Council for Conciliation, Mediation and Arbitration (CCMA) can occur within the text itself.
   • The Constitutional Court is always abbreviated as ‘the Court’; all other courts are referred to as ‘the court’.
6. Avoid awkward or archaic turns of phrase

- Avoid polite legal clichés and wasted words such as ‘the learned judge’, ‘the learned author’, ‘with respect’, ‘with the greatest respect’, ‘it is submitted’ or ‘the authors humbly submit’.
- Judges can be referred to as Judge or Justice, preferably should be referred to as ‘Smith J’ or ‘Smith JA’ or ‘Smith LJ’. Avoid formulations such as ‘his Lordship’ or ‘the honourable’.
- Please eschew archaic uses of the first person. So, ‘it is my view’ or ‘I argue’ is preferable to ‘it is the view of the present author’, ‘it is this writer’s argument’. We know it’s your well-grounded belief.
- Write in the active voice. In short, ‘is’ can almost always be eliminated by a dynamic verb often found in adjectival form in the same sentence.

V. FOOTNOTES

The Journal makes use of footnotes, not parenthetical references. All articles, notes, comments, book reviews and contributions to the current developments section must make use of footnotes. Footnotes are in Garamond size 9.

1. Case law – South African cases

We expect double-barrelled citations for all South African cases. In most instances, this would mean SAFLII’s (ZACC, ZASCA or, if a High Court, something like ZAKZNHC) followed by Juta’s SALRs (e.g. 2008 (3) SA 208 (CC))

- *Occupiers of 51 Olivia Road Berea Township and 197 Main Street Johannesburg v City of Johannesburg & Others* [2008] ZACC 1, 2008 (3) SA 208 (CC) (‘Olivia Road’).

Case names in italic with ‘v’ for versus.

In the absence of an SALR citation, it is acceptable to use a Butterworths citation:


However, triple-barrel citations are fine.

- *Occupiers of 51 Olivia Road Berea Township and 197 Main Street Johannesburg v City of Johannesburg & Others* [2008] ZACC 1, 2008 (3) SA 208 (CC), 2008 (5) BCLR 475 (CC).

- use commas rather than semi-colons between various citations (e.g. [2008] ZACC 1, 2008 (3) SA 208 (CC)).

Cross referencing cases

- *Olivia Road* (note 8 above) at para 45. (Where the case is not cited in the immediately preceding footnote).
- Use ‘Ibid.’ (Where the case and the paragraph reference (or the page reference in the case of a book or a journal) is the same as that in the immediately preceding footnote).
- Use ‘Ibid at para 45.’ (Where the case cited is identical, but the paragraph is not.)

Use paragraphs rather than page references wherever possible. This should always be possible for South African cases in roughly the last decade. All South African Constitutional Court decisions and most Supreme Court of Appeal, Land Claims Court and High Court decisions follow this practice.
2. Case law – foreign cases

Use US citations rather than S Ct or another citation form.
Again, double-barreled citations are welcome.
Try to avoid: *Romer v Evans* 116 S Ct 1620, 1627 (1996). Please look up the US citation; it is always available online.
Avoid using abbreviated names of litigants, eg use Regents of the University of California not Regents of the Univ. of Cal.
Examples:

3. Bracketing

We encourage the use of brief parenthetical explanations of case holdings and quotations.

Examples:
- *S v Makwanyane* [1995] ZACC 3, 1995 (3) SA 391 (CC)(Court holds that death penalty constitutes a violation of rights to life and human dignity.)
- *Wisconsin v Yoder* 406 US 205, 123 SCt 456 (1972)(Supreme Court finds that compulsory school attendance for children of Amish religious community impairs right to free exercise of religion under 1st Amendment.)
- If you are quoting from a text, then provide both the page number and use quotation marks where appropriate:
  - E Mureinik ‘A Bridge to Where? Introducing the Interim Bill of Rights’ (1994) 10 *South African Journal of Human Rights* 31 (Mureinik argues that: ‘The drafters designed the Bill of Rights, and the Constitution as a whole, to foster a culture of law based upon justification, and no longer on mere authority and coercion.’)

Capitallise the first word inside a bracket (Court holds …) or (Dworkin contends …)
Do not use spaces in between brackets.
- *S v Makwanyane* [1995] ZACC 3, 1995 (3) SA 391 (CC)[No Space](Court holds that death penalty constitutes a violation of rights to life and human dignity.)

2. Journal articles

When citing journal articles give author’s initial and name, full title in quotation marks, year in parenthesis, volume number, full (not abbreviated) title of journal (italicised), first page of article, page referred to. Avoid the use of ‘at’ between first page and page referred; use a comma instead, e.g. 315, 325 *(not 315 at 325).*

The *SAJHR* should be cited as *South African Journal on Human Rights*. The *Columbia LR* should be cited as *Columbia Law Review*.
3. Books

When citing books, give author’s first initial and name, full title (italicised), edition, year, page reference. There is no need to state the place of publication and publisher. Page numbers should not be preceded by ‘p’ or ‘pp’. Co-authors must be joined by an ampersand (&) rather than ‘and’.


Translations should be indicated thus: K Marx *Das Capital* (1867) (trans J Mander, 1976) 121.

4. Chapters in books

Author’s initial and name, full title in quotation marks, initial and name of editor(s), full title (italicised), year, first page of article, and specific page referred to in the text.


Subsequent references:
- Ibid at 9‒12.
- Cohen (note 1 above) at 9‒10.

5. Statutes

- Promotion of Administrative Justice Act 3 of 2000 (PAJA)
- Local Government: Municipal Finance Management Act 56 of 2003 (MFMA)
- Childrens Act 38 of 2005

Depending on author preference, it is possible to use the abbreviation for the name of an Act in subsequent references. If referring to a specific section/s, use the abbreviation ‘s’ or ‘ss’ except at the beginning of a sentence.

- PAJA s 6
- MFMA s 3
- Childrens Act s 1

6. The Constitution

Constitution of the Republic of South Africa, 1996 (Constitution). The Interim Constitution requires a footnote. ‘The Interim Constitution has been repealed.’ Thereafter, ‘Constitution’ or ‘Final Constitution’ and ‘Interim Constitution’ may be used in the text and notes.

Subsequent references
- Constitution s 181(1)
- IC s 50
7. Law Reform Commission papers


8. Parliamentary debates

- NCOP Debates col 125 (24 February 1999)

9. Treaties & international instruments

Give ILM reference where available, failing which give UNTS reference or full UN Doc or OAU Doc reference.


For most well-known multilateral treaties, there’s no need for a bibliographical reference.

- Universal Declaration of Human Rights (1948)
- International Covenant on Civil and Political Rights (1966)

10. Newspaper articles and Internet sources

Newspaper articles and many internet sources can be treated much like other written sources: Author ‘Article Name’ Newspaper/Internet Source (Date), available at http://www.xxx. It is not necessary to record the date that the site was last visited.

VI. MORE GENERAL RULES

1. Eliminate ‘See’ from the beginning of all footnotes.

Exceptions:
We allow ‘see’ when they are buried in a footnote.
• For more on the contention that the idea of self-government should be considered to be the core component of a Constitution, even one with a justiciable Bill of Rights, see F Cachalia ‘Separation of Powers, Active Liberty and the Allocation of Public Resources: The E Tolling Case’ (2005) 132 South African Law Journal 285.

We allow ‘See also’ after primary citations.

2. Use ‘&’ rather than ‘and’ in footnotes

3. Titles are in first letter caps, no matter whether they are articles, books, newspaper articles or online documents.
• S Woolman A Politics of Accountability: How South Africa’s Judicial Recognition of the Binding Legal Effect of the Public Protector’s Recommendations Had a Catalysing Effect that Brought Down a President (2019).

4. On the use of ‘Section’, ‘section’ or ‘s’ with respect to the Constitution.

Write out ‘Section’ (capital S as in ‘Section 25 of the Constitution) to begin a sentence. Lower case ‘section’ is used in other instances (e.g. ‘In FNB, the Constitutional Court provided its first full length analysis of section 25 of the Constitution). However, it is not necessary to keep
repeating ‘section 25 of the Constitution’ throughout the text. The idea is to make it clear that we are talking about the Constitution, as opposed to another form of law. However, to repeat ‘section 25 of the Constitution’ each time would be truly unwieldy, cumbersome and just plain ol’ bad writing. In footnotes, the preferred form is Constitution s 25.

5. Please don’t forget to use ‘at’.
   • AB CC (note 4 above) at para 197.

6. Some footnotes are complicated.

We still try to make each component part as simple as style allows. Some citations warrant a brief description in a parenthetical; some require a number of sentences; some require only a prior reference such as “(note x above)” and a page number.

Example:

Gerrand (note 52 above) at 142 (Observes that ‘in terms of ancestral beliefs, family systems have rigid boundaries based on blood ties.’) Gerrand’s view is echoed by the KwaZulu-Natal Commissioner for Traditional Leadership Disputes and Crimes, Professor Jabulani Mphalala, who has stated that ‘it would take years before there was a flexibility of mind about adoption among most South Africans. […] Ancestral spirits look after their relatives and no-one else. In our religion, in our culture, this thing is ring-fenced.’ C Dardagan ‘Red-Tape Slowing down Adoptions’ IOL (21 February 2014), available at https://www.iol.co.za/lifestyle/family/parenting/red-tape-slowing-down-adoptions-1650829. See also Mokomane & Rochat (2010)(note 52 above) at ix; Rochat, Mokomane & Mitchell (note 52 above) at 124 (A study participants remarks: ‘When you are born, there are certain things that ancestors require of us. They know who our child is and where he is. Just imagine if you adopt a Biyela child and join the child to the Mthembus. There will be war between the Biyela and Mthembu ancestors, both ancestors will fight over who owns the child.’)