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The Rights of the State, and the State of Rights in *State Information Technology Agency Soc Limited v Gijima Holdings (Pty) Limited*

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ABSTRACT: In *Gijima,* the Constitutional Court held that organs of state cannot review their own administrative decisions by relying on either the right to just administrative action, or the Promotion of Administrative Justice Act (PAJA). This article explores the reasoning behind this finding, suggesting it is sourced in the Court's understanding of the application of the rights in the Bill of Rights, rather than in a misconstrual of the Constitution's standing provisions, or an interpretation of s 33 and PAJA. It then considers the Court's substantive claims about the relationship between the state and private persons, and the nature of the state as a prospective rights-bearer. It concludes by suggesting that thinking of the state as a collection of 'processes', rather than as a discrete entity, allows for a more flexible understanding of the application of rights. This flexibility opens space for the state to rely on constitutional rights, even against itself.

KEYWORDS: application of rights, s 8 of the Constitution, rule of law, administrative law, PAJA, judicial review, Bill of Rights, organs of state

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'I can't explain myself, I'm afraid, Sir, because I'm not myself you see.'
—Lewis Carroll, *Alice in Wonderland*

I. INTRODUCTION

Are organs of state entitled to claim constitutional rights? This question sits at the heart of the Constitutional Court's judgment in *Gijima*.[1] Madlanga J and Pretorius J found for a unanimous Court that because organs of state are not protected by the Bill of Rights, they cannot review their own administrative decisions by relying on the right to just administrative action, nor can they rely on the Promotion of Administrative Justice Act (PAJA).[2] Instead, they ought to pursue review under the rule of law.[3] Administrative decision-makers may – and in some cases must[4] – review their own administrative decisions if wrongly made, but only as breaches of the Constitution's expectation that all exercises of public power be lawful.[5]

The Court's finding has garnered criticism because it narrows the domain of rights, while simultaneously expanding the ambit of rule of law review. It is by now customary around law-school water-coolers to remonstrate over the proliferation of the principle of legality, and for good reason: the precise and detailed provisions of PAJA provide a consistency and nuance that rule of law review seldom exhibits.[6] In a similar vein, some ten years ago in *The Amazing, Vanishing Bill of Rights*, Stu Woolman warned that the sort of rights-avoidance strategy epitomised by *Gijima*, 'grants the court the licence to decide each case as it pleases, unmoored from its own precedent'.[7] The increasingly creative strategies for disappearing doctrinal law in favour of discretionary legal principles suggest that the reasons behind the Court's evasions are in need of address.

At the same time – and unlike in other 'avoidance' cases – Madlanga J and Pretorius J do confront the question of whether the Bill of Rights and PAJA should be applied head-on.[8] The Court is moreover careful to narrow the ambit of its precedent to cases where an administrative decision-maker seeks review of its own decision; organs of state can still administratively review each other's decisions, and even different decision-makers within the same organ may be entitled to rely on PAJA.

The core contention of this paper is that the foundational problem with the judgment – and the most pressing cause for jurisprudential disquiet – is not the Court's eschewing of administrative review in favour of the principle of legality, but instead its distorted view of the *application* of the rights in the Bill of Rights. In short, *Gijima* both misconstrues rights as

1 *State Information Technology Agency v Gijima Holdings* 2018 (2) SA 23 (CC), 2018 (2) BCLR 240 (CC)(*Gijima*).

2 Ibid at paras 18 and 37.

3 *Albutt v Centre for the Study of Violence and Reconciliation* 2010 (3) SA 293 (CC), 2010 (5) BCLR 391 (CC) at para 49; *Affordable Medicines Trust v Minister of Health* 2006 (3) SA 247 (CC), 2005 (6) BCLR 529 (CC) at para 49.

4 *Merafong City Local Municipality v AngloGold Ashanti Limited* 2017 (2) BCLR 182 (CC), 2017 (2) SA 211 (CC) (*Merafong*) at para 58; *Khumalo v Member of the Executive Council for Education: KwaZulu Natal* 2014 (5) SA 579 (CC), 2014 (3) BCLR 333 (CC)(*Khumalo II*) at para 45.

5 *Gijima* (note 1 above) at para 38.

6 For more on the subject matter traversed in *Gijima*, see C Hoexter 'South African Administrative Law at a Crossroads: The PAJA and the Principle of Legality' (2018) *Administrative Law in the Common Law World*, available at https://adminlawblog.org/2017/04/28/cora-hoexter-south-african-administrative-law-at-a-crossroads-the-paja-and-the-principle-of-legality/.

7 S Woolman 'The Amazing, Vanishing Bill of Rights' (2007) 124 *South African Law Journal* 762, 784.

8 *Gijima* (note 1 above) at para 30.

constitutively bound up with the relationship between private persons and the state, and adopts an outmoded conception of the 'nature' of the state for the purposes of s 8 of the Constitution.[9] These descriptive inaccuracies result in organs of state being barred from relying on the right to just administrative action, and associatively on PAJA.

The Court's reasoning gives rise to an application problem because it speaks to who bears – and who is bound – by constitutional rights. Its key finding is that rights only apply when a private person claims one of the substantive entitlements in the Bill of Rights. Rights are the claims of private persons constitutively: what they are is contingent on how they are enforced. Because of this, the state can never rely on the right to just administrative action, no matter the breadth of the Constitution's standing provisions. Addressing the version of rights application adopted in *Gijima* is important both because the Court's perspective impacts administrative review, and because its conception of the state, and the state's relationship with private persons, has implications for determining the ambit of other rights.

Part II of this note sketches the Constitutional Court decisions that led up to *Gijima*. Part III considers the reasoning of the Court. Part IV demonstrates that *Gijima*'s conclusion is grounded in ideas about the application of the Bill of Rights, rather than on a misconstrual of standing, or an interpretation of s 33 and PAJA. Parts V and VI then consider Madlanga J and Pretorius J's substantive claims about the relationship between the state and private persons, and the nature of the state as a prospective rights-bearer.

II LEGAL BACKGROUND

The judgment in *Gijima* ends a dispute that has simmered in South African law for some time. The Constitutional Court faced it for the first time in *Khumalo*.[10] Mr Khumalo had been promoted to a post three levels above his extant pay grade in the Kwazulu-Natal Education Department, seemingly unlawfully. Following a protracted labour dispute brought by those overlooked for the position, the MEC for Education sought to review Mr Khumalo's promotion. The majority of the Constitutional Court found that the 'true nature' of the application was one of 'judicial review under the principle of legality'.[11] By contrast, the minority decision of Zondo J found that 'the procedure for bringing [the] application to Court was governed by the PAJA'.[12] The majority itself however finds that should the granting of the promotion have been administrative action – as opposed to an act in the dominion of a labour relationship – then the MEC would have had to bring the review through PAJA.[13] While steeped in ambiguity, both the majority and the minority decision therefore suggest that organs of state are, in general, permitted to rely on the right to just administrative action.

A similar position obliquely emerges in *Kirland Investments* decided three months after *Khumalo*.[14] In that case the Superintendent-General for Health in the Eastern Cape (Mr Boya) was confronted by a decision, made in his absence, licensing the establishment of a private

[9] Section 8(4) of the Constitution of the Republic of South Africa, 1996 (Constitution) states: 'A juristic person is entitled to the rights in the Bill of Rights to the extent required by the nature of the rights and the nature of that juristic person.'

[10] *Khumalo II* (note 4 above).

[11] Ibid at para 28.

[12] Ibid at para 92.

[13] Ibid at para 27.

[14] *MEC for Health, Eastern Cape v Kirland Investments* 2014 (3) SA 481 (CC), 2014 (5) BCLR 547 (CC)('*Kirland*').

hospital. The decision was taken, apparently unlawfully, by an acting Superintendent-General who had been appointed while Mr Boya was on leave. The Court was asked to determine Mr Boya's responsibilities when faced with the alleged unlawful act on his return to work. In deciding that Mr Boya had a duty to review the decision – as opposed to simply ignoring it – the majority of the Court relied on a close reading of several of PAJA's provisions.[15] It also grounded its reasoning in the constitutional obligation on the state to 'provide for review of administrative action'.[16] This suggests that the court saw Mr Boya's review of the acting Superintendent-General's decision as the vindication of the right to just administrative action through its statutory extension: PAJA.

The opacity inherent in *Kirland* and *Khumalo* became more acute in a triptych of cases, decided within a year of each other. The first of these, *Merafong*, involved a decision of the Minister of Water Affairs and Forestry to overturn a previous decision made by the Merafong Municipality placing a surcharge on the price that AngloGold paid for water in the District.[17] Deciding that the Municipality had been obliged to obey the Ministers decision – lawful or otherwise – the majority of the Court reasoned that PAJA contained provisions that required the Municipality to institute review even if the administrative decision was patently unlawful. As with *Kirland*, this line of argument suggests that a state entity – exemplified here by the Municipality – should bring a review in terms of PAJA when faced with an unlawful decision by an organ of state.

The majority made clear, however, that it was not deciding the question of whether PAJA or 'legality' was the appropriate avenue of review. When considering Merafong's tardiness in challenging the Minister's decision, Cameron J noted that 'Whether under PAJA, or legality review, [Merafong] was obliged to institute proceedings to review the decision without unreasonable delay.'[18] This suggests that the Court had no intention of prescribing the pathway to review that Merafong should have utilised. Later, the majority emphasised that the application the Court was asked to decide had been brought by AngloGold in order to enforce the Minister's decision, rather than being a review on behalf of Merafong. For this reason, the Court did not need to determine if PAJA applied.[19]

Faced with a similar legal quandary in *Tasima*, the Court once more sidestepped the question of which pathway to review was apposite.[20] In that case, the Director-General of the Department of Transport extended a contract with a private company, Tasima, to provide road management services in Gauteng. The extension was, again, granted on tremulous legal grounds. Under duress from Tasima to perform in terms of the contract, the department sought to subsequently reactively challenge its own decision. Unlike in Merafong, the Court considered, and upheld, the Department of Transport's reactive challenge. It did not, however, decide under what auspices the department's review should have been brought. In a footnote, the Court instead found that: 'The question of whether challenges, reactive or otherwise, to exercises of public power by the state can be initiated through PAJA need not be decided here.'[21]

[15] Ibid at para 82.
[16] Ibid.
[17] *Merafong* (note 4 above).
[18] Ibid at para 73.
[19] Ibid at para 75.
[20] *Department of Transport v Tasima* 2017 (2) SA 622 (CC), 2017 (1) BCLR 1 (CC)(*Tasima*).
[21] Ibid at fn 78.

Unlike *Merafong* and *Tasima*, the third of this triptych, *Aurecon South Africa*, did take the form of a direct review of its own decision by an organ of state.[22] Here, the City of Cape Town sought to review its own decision to award a contract to decommission a power station to Aurecon. While opting to use the 180-day rule set out in PAJA as a benchmark for determining if the review had been brought too late, the Court made explicit that it was not determining the question of whether PAJA or the rule of law was the preferable pathway to review chiefly because arguments on the question were not properly before it.[23]

These cases suggest that while no definite pronouncement had been made, the Constitutional Court more often than otherwise has assumed that PAJA could be used where the state sought to review its own administrative action. Remarkably, in none of the cases was the question of whether or not the state is entitled to rely on rights as a whole even canvassed. Instead, emphasis was always put squarely on whether or not the decision itself was administrative action, and whether any sort of review could be brought. It was therefore something of a surprise when the *Gijima* Court reversed the prevailing view.

III *GIJIMA*, THE STATE AND RIGHTS

Gijima, a private company, contracted with the State Information Technology Agency (SITA), an organ of state, to provide IT support to the South African Police Services (SAPS). Primed by the imminent threat of litigation to enforce the contract, SITA sort to review the tender and set it aside on the grounds that proper procurement mechanisms had not been followed when it was awarded.

The High Court found that the granting of the tender constituted administrative action under PAJA, and that the review should consequently be determined in terms of that Act. The Supreme Court of Appeal agreed. It also confirmed that the principle of subsidiarity required that the review be conducted in terms of PAJA, rather than directly through s 33 of the Constitution, or under the rule of law.

Madlanga J and Pretorius J, writing for a unanimous Court, came to a different conclusion. They found that an organ of state can never rely on PAJA, nor the right to just administrative action, in seeking to review its own decision. Instead, SITA's review could only have been brought as a breach of the principle of legality.

The *Gijima* Court supported its finding by characterising PAJA as an extension of the constitutional right to just administrative action.[24] It then reasoned that as s 33 is a right, the Court must first determine the 'philosophical underpinnings of the very notion of whom fundamental rights are meant to protect'.[25] As the Court saw it, whether SITA is entitled to rely in general on the rights in the Bill of Rights should 'inform' the interpretation of the right to just administrative action.[26] With this in mind, Madlanga J and Pretorius J find it 'quite axiomatic that fundamental rights are meant to protect warm-bodied human beings primarily

[22] *City of Cape Town v Aurecon South Africa* 2017 (4) SA 223 (CC), 2017 (6) BCLR 730 (CC)('*Aurecon*').

[23] Ibid at paras 34–37.

[24] The Court's claim that, 'the concept of "administrative action" in whatever section of PAJA cannot suddenly have a meaning wider than that envisaged by the source of the concept, namely the Constitution', is troubling in its own right: legislation – even constitutionally mandated legislation – can surely offer more entitlements than the Constitution sets out.

[25] *Gijima* (note 1 above) at para 18.

[26] Ibid.

against the State.'[27] Those who are not 'human beings' (seemingly inclusive of private juristic persons), are therefore not entitled in general to directly invoke rights. As organs of state like SITA fall into this category, they cannot have recourse to the right to administrative justice, and so cannot rely on PAJA when orchestrating review.

The Court substantiated its conclusion in two ways. First, through an analysis of existing decisions and the context in which the rights-regime in South Africa has emerged, it looked to show that the Constitution only ever meant to afford private persons rights, essentially for purposes of responding to state action or inaction.[28] They began by citing the *First Certification* judgment, in which the Court found that, 'The movement to recognise and protect the fundamental rights of all human beings gained increased momentum in the international arena from the end of the Second World War.'[29] The Court put emphasis on the words 'human beings' to find that, from the outset, South Africa's constitutional rights were aimed at protecting individual persons and their collective associations.[30] They noted further that the Constitutional Principles that gave rise to the Bill of Rights in the Interim Constitution were described by the *First Certification* Court 'as the inalienable rights of *human beings'* (Italics in the original).[31]

Thereafter the Court genealogically connected the rights in the Bill of Rights, through the Constitutional Principles, to the 'fundamental rights and freedoms' enshrined in the United Nations Universal Declaration of Human Rights (UDHR) and other international human rights instruments.[32] Madlanga J and Pretorius J construed these international entitlements as 'universal' only to the extent that all human beings have them against the state. Noting that South Africa's Bill of Rights protects different rights to those protected by international legal instruments, Madlanga J and Pretorius J nevertheless found that the rights in the Bill of Rights maintain the same character of applying only to private persons.

Second, the judgment asserts that it is 'inconsonant that the State can be both the beneficiary of the rights and the bearer of the corresponding obligation that is intended to give effect to the rights.'[33] In other words, as a matter of principle, the state cannot be both the giver and receiver of the same legal entitlement. Madlanga J and Pretorius J argued that this is especially true in the case of the right to just administrative action, where to argue otherwise would mean that an organ of state would be entitled to ask itself for reasons, or that it act reasonably, or in accordance with the law.

Finally, the Court turned to interpreting the content of s 33 and PAJA against the background of its previous analysis.[34] Madlanga J and Pretorius J tracked the abusive history of administrative law in South Africa. Noting that the object of this abuse had been private persons, and the subject the state, they found that 'the intended beneficiaries of the change' in South Africa's approach to holding administrative decision-makers to account 'were private

[27] Ibid.

[28] Ibid at paras 19–24.

[29] Ibid at para 19 citing *Ex parte Chairperson of the Constitutional Assembly: In re Certification of the Constitution of the Republic of South Africa* 1996 (4) SA 744 (CC), 1996 (10) BCLR 1253 (CC) at fn 46.

[30] Ibid at para 22.

[31] Ibid at para 19.

[32] Ibid at para 23.

[33] Ibid at para 27.

[34] Ibid at para 24.

persons'.[35] For this reason, they concluded that the right to administrative justice existed solely to protect private persons from the abuse of state-sanctioned administrative decision-makers. Resultantly, organs of state cannot utilise PAJA.

IV THE APPLICATION OF RIGHTS

Several perceptive commentators have read *Gijima* as making a finding about whether or not the state has standing to enforce PAJA. Both Mitchell de Beer and Leo Boonzaier show that neither the provisions relating to standing in the Act, nor s 38 of the Constitution, preclude the enforcement of a PAJA-right by a person different from the right-holder.[36] It seems clear that if *Gijima* aims to 'establish that organs of state lack standing to enforce PAJA's rights', then it should fall foul of these challenges. The standing of organs of state should not depend on whether the state's interest is at stake, and, even it were, there is little reason to think that SITA lacks sufficient personal interest in the relief sort.

My view, however, is that this reproach is at odds with the conceptual shape of the judgment. As the previous section outlines, the bulk of the Court's analysis has to do with the historical and philosophical roots of rights in general. The Court deliberately began its reasoning by determining the nature of rights as a whole. Madlanga J and Pretorius J subsequently used this framework to argue for rights being inherently privileges claimed by private persons, 'primarily' from the state. In exceptional cases, they are claims made by private persons against one another. But, pivotally, rights are *always* claims made by private persons of some or other party. The substantive entitlements in Chapter 2 of the Constitution only become 'rights' when private persons do the claiming. The Court spent considerable energy establishing this point, and fleshing out its historical genesis. It saw the notion as both an 'axiomatic' truth, and a feature of existing law, italicising 'human beings' at every opportunity.[37] It was also the norm it hoped to extract from the *First Certification* case, and what it characterised as a 'fundamental right' in Constitutional Principle II. Madlanga J and Pretorius J's contention was that the question of whether the state can claim rights is dependent, firstly, on when rights are claimable, and only subsequently on who has standing to enforce them. The animating structural idea is that rights are not free-floating entitlements; they are relational: rights lack conceptual force without reference to the relationship between private persons and either the state or other private persons. Reference to the question of who rights 'protect' is a misnomer – the substance of the Court's point is about when rights can be claimed at all.

This reasoning evokes the language of standing. Who can enforce the substantive entitlements in the Bill of Rights remains central to the Court's reasoning. But what is distinctive about its finding is that enforcement questions are built into its understanding of rights. More accurately, the *application* of the claims in the Bill of Rights is defined in terms that include reference to their enforcement. As I see it, the Court finds that rights only apply when private persons are doing the enforcing. Madlanga J and Pretorius J began their

[35] Ibid at para 26.

[36] As both pointed out, following *Giant Concerts*, standing under PAJA is at least as encompassing as the enforcement of the rights in the Bill of Rights. *Giant Concerts v Rinaldo Investments* [2013] ZACC 251, 2013 (3) BCLR 251 (CC) at paras 28-29. M de Beer 'A New Role for the Principle of Legality in Administrative Law: *State Information Technology Agency Soc Ltd v Gijima Holdings (Pty) Ltd*' (2018) 135.4 *South African Law Journal* 613; L Boonzaier 'A Decision to Undo' (2018) 135.4 *South African Law Journal* 642.

[37] Ibid at para 18.

discussion of the 'philosophical underpinnings of the very notion of whom fundamental rights are meant to protect' by referring to the assessment of s 8 of the Constitution in the *First Certification* judgment, and application remains at the heart of their analysis. The state cannot enforce rights claims not because it lacks standing, but because rights only apply when the substantive entitlements in question are claimed by private persons: who claims the right is a constitutive feature of when rights apply.

That this is the line of reasoning is not always plain. *Gijima* actively fudges findings about interpretation with findings about application, which obscures its insouciance to standing still further. When the Court shifts from its analysis of the meaning of 'fundamental rights' – an inquiry essentially about application – to its construal of s 33 – a finding about interpretation – it claims to be moving from sketching the 'background' of the Bill of Rights into defining the ambit of the right to administrative justice. But if this background incorporates claims about when rights apply in general – as I have suggested is the case – then the Court is eliding application and interpretation. Application sets the scope and form of the Bill of Rights. Interpretation establishes the meaning of the rights themselves. The interpretation of a particular right does not define the application of rights as a whole; the application of rights instead sets the parameters of that right's interpretation. Shoehorning an application finding into an interpretation analysis allows the Court to avoid taking on the full implications of its decision for the ambit of rights in general, while simultaneously acquiring fuzzy reasons for its specific finding that the state is barred from relying on PAJA as an 'extension' of s 33.

This is not to say that application and interpretation should be hermetically sealed from each other. Section 8(4) of the Constitution states that a juristic person is entitled to the rights in the Bill of Rights 'to the extent required by the nature of the rights'. Courts are therefore required to interpret individual entitlements in order to establish their application, and there may be occasions when the application of a right is dependent on its content. This is because there are some rights – for example the right to life or dignity – which a juristic person cannot sensibly hold. These are cases where the general application of the Bill of Rights bends to the specificities of particular entitlements. But this is different from saying that the interpretation of a specific right can impact on how all rights apply. Just because PAJA can be interpreted to operate between private persons and the state, does not mean that there is a general rule of application to this effect.

There are also strong reasons for suggesting that s 33 cannot be interpreted to exclude the state from relying on the right.[38] Various constitutional provisions explicitly limit the ambit of rights to 'citizens', 'workers', 'children', and so on. Using interpretative tools to determine what these terms include, and consequently who is entitled to the associated privileges, is a regular feature of constitutional adjudication. In *Gijima*, the Court purported to be doing just this sort of interpretative work when it found that 'everyone' in s 33 of the Constitution does not include organs of state.[39] It argued that as s 33(3) 'imposes a duty *on the state* to give effect to the rights in s 33(1) and (2)' (Court's italics), it would be 'inconsonant' for the state to also be the beneficiary of the right.[40]

[38] S Woolman 'Category Mistakes and the Waiver of Constitutional Rights: A Response to Deeksha Bhana on *Barkhuizen*' (2007) 125 *South African Law Journal* 1.

[39] *Gijima* (note 1 above) at para 27.

[40] Ibid.

Notably, however, the facts of *Kirland*, *Merafong* and *Tasima* illustrate that, in practice, there are many occasions when the state does have reasons for wanting to review its own decisions; while *Aurecon*, as well as *Gijima* itself, show that this ambition can even extend to the same decision-maker. These cases often arise in the context of mismanagement or corruption, and the review is generally brought to avoid the consequences of a past wrong. The important point is that the Court has entertained the review (or rejected it on the basis of delay) in each case. The *Gijima* Court was also happy to accept the principle, first established in *Kirland*, that organs of state *must*, on most occasions, frontally challenge their own decisions. It was therefore not opposed to organs of state reviewing their own decisions as a general proposition.

Of course, if the entitlements in PAJA – an Act of Parliament – can be (and are) wider than s 33, the Court's point about the ambit of the rights in the Bill of Rights is largely academic. What matters is whether SITA's awarding of the contract constituted administrative action as defined by PAJA, rather than who it is that makes the claim. Whether or not the rights in the Bill of Rights are defined by their enforcement by private persons has seemingly little to do with whether Parliament can give the same substantive powers to the state, without limiting its enforcement. De Beer makes the point in helpfully rhetorical form: 'had Parliament explicitly required organs of state to rely on PAJA when seeking to have their own decisions set aside on review, would that be unconstitutional? I would argue "no".'[41] This argument is essentially convincing. PAJA itself makes unnecessary the Court's findings on the application of rights: its reasoning should have started and ended with the Act. It does, however, raise the spectre of the relationship between constitutionally obligatory legislation and the constitutional provisions – as well as broader social values – that they cement.[42] Lael Weitz argues compellingly that constitutionally obligatory legislation has special status, because it affords the legislature the power to augment the Constitution. But can a piece of legislation, explicitly promulgated to define and protect a right, take on a shape fundamentally different to that of the corpus of rights in general? Put otherwise, if Madlanga J and Pretorius J are correct that rights only apply between private persons and the state, can PAJA broaden this scope to include relationships between private persons and the state?

These are delicate questions about how constitutionally obligatory legislation affects the way in which the Constitution is interpreted and applied. Whether constitutionally obligatory legislation should be applied and interpreted as ordinary legislation, or as a constitutional provision, or some hybrid of both, has not been settled in our law. *AgriSA* suggests that individual constitutional rights should be interpreted in ways that are compatible with legislatively-determined content where that legislation is constitutionally mandated.[43] Extending this maxim to the application of rights as a whole nevertheless seems a substantial leap, handing considerable power usually set aside for the judiciary to Parliament.

In any event, the impetus behind *Gijima* – and the reason that the Court ultimately concludes that PAJA does not apply – is the finding that a right is a claim made by private

[41] De Beer (note 36 above) at page 620–621. Boozaier (note 36 above) at page 650 makes a similar point: '[T]o insist that the legislature may not enhance those protections is a different thing altogether. That would be a self-evidently unsound principle, thoughtlessly curtailing the legislature's rightful use of its powers.'

[42] Section 33(3) of the Constitution requires that national legislation be enacted to give effect to the administrative law rights set out in section 33(1) and 33(2). As the preamble explains, PAJA was promulgated for this purpose: 'To give effect to the right to administrative action that is lawful, reasonable and procedurally fair and to the right to written reasons for administrative action as contemplated in section 33 of the Constitution.'

[43] *Agri South Africa v Minister for Minerals and Energy* [2013] ZACC 9, 2013 (4) SA 1 (CC) at paras 68–69.

persons. In the next section, I suggest that this approach is nevertheless dependent on an understanding of the state and its role in defining rights. The Court's reasons for wanting to construe rights as defined as the claims of private persons is premised on an perception/view of the state as an homogeneous purveyor of rights. I conclude in the final section by suggesting that a better approach may be to consider the question of whether a state-actor can rely on the right to just administrative action in – to use an abused phrase – on a 'case-by-case basis', with emphasis put on the process under review, rather than the institutional actor.

V RIGHTS AS THE CLAIM OF PRIVATE PERSONS AGAINST THE STATE

On its face, the Court's finding in *Gijima* that the nature of rights is such that they only apply when claimed by private persons can be excised from any dispute over whether or not rights are bound up with the relationship between the state and private persons. It is possible that Madlanga J and Pretorius J are correct that rights are the entitlements of private persons alone, but wrong that rights exist primarily between private persons and the state. The *Gijima* Court seems, however, to interweave the two arguments. It explains that the reason why the state cannot rely on rights is because rights exist to off-set the threat posed by the state to private persons.[44] On the *Gijima* reading, the whole schema of rights is dependent on holding state power to account — if there was no political force exerted by the state on private persons, there would be no need for rights.[45]

To further engage this reasoning, the following section looks at the conception of the state in the application of rights. *Gijima*'s historical analysis rightly shows that viewing rights as the claims of private persons against the state has deep historical roots: the discourse of human rights in its modern form emerged as a response to state oppression.[46] But the record of rights in the years since the passing of the UDHR has brought this rigid structuring into question.[47] In particular, proponents of rights now generally acknowledge that the power dynamics policed by rights do not exist solely between the state and private persons. Indeed, with the rise of deregulated economies, it is increasingly the relationships between private persons themselves that need supervision.[48]

A prescient example is the rise of international agreements on business and human rights. Article 12 of the Guiding Principles on Business and Human Rights is headed: 'The responsibility of business enterprises to respect human rights'.[49] This responsibility includes businesses avoiding, causing or contributing to human rights abuses, and acting to mitigate the negative human rights consequences of their work.[50] South Africa has committed itself to

[44] *Gijima* (note 1 above) at paras 18 and 26.

[45] An important facet of the *Gijima* court's approach is that it necessarily associates rights and institutions. There may be moral or agency-based support for what a private person is entitled to ask of the state, but these are not free-floating entitlements. They exist because people and the state exist. This is a *political* conception of human rights: we identify what rights are by illustrating what role they play in some political sphere. C Beitz *The Idea of Human Rights* (2009); J Rawls *The Law of Peoples* (1999).

[46] *Gijima* (note 1 above) at paras 26–31.

[47] J Donnelly *Universal Human Rights in Theory and Practice* (2003); C Tomuschat *Human Rights: Between Idealism and Realism* (2008).

[48] D Bhana 'The Horizontal Application of the Bill of Rights: A Reconciliation of Sections 8 and 39 of the Constitution' (2013) 29 *South African Journal on Human Rights* 2, 353.

[49] Guiding Principles on Business and Human Rights, art 12.

[50] Ibid art 13.

developing a binding international treaty on Business and Human Rights, suggesting awareness on the part of the Executive that human rights obligations extend beyond the relationship between the state and private persons.

More tellingly, that the application of the Bill of Rights extends beyond the vertical private-state dichotomy is embedded in s 8 of the Constitution. Section 8(2) states that, 'A provision of the Bill of Rights binds a natural or a juristic person if, and to the extent that, it is applicable, taking into account the nature of the right and the nature of any duty imposed by the right'. In *Khumalo v Holomisa*, the Court found this to mean that at least some rights in the Bill of Rights bind private persons some of the time.[51] In *Juma Musjid Primary School v Essay*, the Court extended this interpretation to 'require private parties not to interfere with or diminish the enjoyment of a right'.[52] Recently, in *Daniels v Scribante*, this finding was extended further to mean that, 'the duty imposed by the right to security of tenure, in both the negative and positive form, does rest on private persons'.[53] These cases show that there are at least some occasions where the Constitution requires both the positive and negative horizontal application of rights – it is simply not true that rights are inherently claims made by private persons against the state.

There are also strong theoretical reasons for holding that rights apply beyond the vertical private-state relationship. Stu Woolman argues convincingly that s 8(1)'s use of the words 'all law' means that every extant legal artefact is bound by the Bill of Rights.[54] This includes common law agreements between private parties, and, on what Woolman calls a 'Hohfeldian' view of the law, also the body of norms that govern social relationships outside of explicitly codified rules.[55] If this is the case, then it is clear that the Bill of Rights finds application even where the state is not a duty-bearer.

The *Gijima* Court acknowledges this line of work, but does not see it as terminal to its interpretation of the application of rights.[56] This reticence invites questions over why, exactly, South African courts continue to want to view rights as *inherently* caught up with the rapport between the state and private persons. A charitable interpretation of the phrase 'meant to protect warm-bodied human beings, primarily against the state' may provide some traction in answering this question. Perhaps the Court means to say no more than that rights inherently provide aegis to private individuals, and that both the most prescient threat to their rights, and the most capable source of their vindication, is the state. This severs the conceptual tie between private persons and the state in defining rights, and erects in its place a looser association sourced in the essential role the state plays in governing a constitutional democracy.

The reasoning in *Blue Moonlight Properties* is an instructive example here.[57] In that case, a private company, Blue Moonlight, sort to evict a number of unlawful occupiers from a building it owned. The occupiers objected to the eviction order. After noting that the

[51] *Khumalo v Holomisa* 2002 (5) SA 401 (CC), 2002 (8) BCLR 771 (CC)('*Khumalo I*') at paras 29–34.

[52] *Governing Body of the Juma Musjid Primary School v Essay N.O.* 2011 (8) BCLR 761 (CC) at para 58.

[53] *Daniels v Scribante* 2017 (4) SA 341 (CC), 2017 (8) BCLR 949 (CC) at para 49. See also *Barkhuizen v Napier* 2007 (5) SA 323 (CC), 2007 (7) BCLR 691 (CC) at para 57.

[54] S Woolman 'Application' in S Woolman & M Bishop (eds) *Constitutional Law of South Africa* (2nd Ed, 2008) Chapter 31.

[55] Ibid at Ch 31 46–47.

[56] *Gijima* (note 1 above) at fn 18.

[57] *City of Johannesburg Metropolitan Municipality v Blue Moonlight Properties 39* 2012 (2) BCLR 150 (CC), 2012 (2) SA 104 (CC)('*Blue Moonlight*').

Occupiers grounded their claim in the rights to housing and equality, the Court immediately shifted to determining the state's responsibility in alleviating the detrimental consequences of the proposed eviction.[58] This approach seems to have been prompted by Blue Moonlight's protestation that the occupiers' continued occupation violated the company's right to property.

The case thus pitted two compelling, and opposing, rights claims against each other. What is more, two opposing rights claims with considerable political heft. In such a context, it is understandable why apportioning responsibility to the state looms as a compelling middle way. By finding that the state had to provide adequate alternative accommodation to the occupiers (on the basis of its own existing laws and policy), the Court was able to shift the rights obligation of housing the applicants from the owner of the building to the state. At the same time, by sanctioning the eviction on condition that the state make alternative accommodation available, the Court similarly shifted the rights obligation of avoiding arbitrary deprivation of property from the occupiers to the state.

The implicit reasoning adopted by the Court is that the threat to the housing rights of the Occupiers, and the property rights of the owners, was a result of the state's failure to provide adequate alternative accommodation. The Court conspicuously declined to declare that either the occupiers or the owners infringed rights: it was only the state's housing policy that was found unconstitutional. But does this mean that by bringing the evicting application Blue Moonlight was not violating the occupiers' rights? And by illegally settling the building, were not the occupiers violating the rights of Blue Moonlight?

Through finding, in this and other cases, that the state must always be joined in eviction applications, the Court has ensured that we will never know the answer to these questions. Instead, the state remains the only visible duty-bearer: the Court allocates duties to the state in order to avoid the more complex question of resolving mutually valid competing rights claims between private persons. State apparatuses become a collectively-agreed – and judicially-sanctioned – mechanism for characterising and resolving social ills.

The judicial signal is that — in cases like *Blue Moonlight* — there are reasons why private disagreements may be better resolved by allocating the obligations that arise from being bound by rights to organs of state. Doing so enables courts to acknowledge the political and social character of rights disputes while providing solutions that avoid placing responsibility at the door of either of the private litigants.

In many respects, this is a positive feature of our constitutional order. The state is given the obligation to protect and promote rights, even where the claim jeopardising a person's interests are seemingly private in nature. At the risk of oversimplification, the state collects taxes, and holds the power of coercion exactly so as to bring about the social goods set out by law-makers and the Constitution.[59] The holding of this obligation helps ensure that disagreements and social tensions are diverted through legal channels, rather than being settled outside of them.[60] There are therefore good reasons for having the state at the centre of the realisation of rights.

Does this analysis mean that organs of state should be barred from relying on rights themselves? My tentative view is that it does not. Indeed, the reverse seems to be true: if the state bears the burden of ensuring the protection of rights, it should be able to apply them directly when doing so is advantageous for 'human beings'. This is exactly what occurred in

[58] Ibid at paras 19–20.

[59] N W Barber *The Constitutional State* (2010).

[60] T Ginsburg & A Huq 'Introduction' in T Ginsburg & A Huq (eds) *Assessing Constitutional Performance* (2016).

Gijima. SITA's review was grounded in its belief that the contract signed between itself and Gijima did not comply with s 217 of the Constitution, and was therefore unlawful. One of the key normative principles at the heart of s 33 is that unlawful administrative actions should be set aside. The setting aside of unlawful decisions is valuable because it protects private persons from capricious state action. The benefit derived from this standard surely does not change when it is the state that seeks to enforce the law.

The converse view, which sees administrative review as the preserve of private persons, suggests that what matters is not so much the content of the right, as the fact of a private person enforcing it. This interpretation is echoed by the *Gijima* Court's finding that it would not make conceptual sense for an organ of state to review its own decisions. Such a position has distinctly political undertones. Rights are here construed as the entitlements of a disgruntled citizenry, spurred on by an antiquated form of republicanism in which the state is pictured as a monolithic iniquity which private persons must hold to account.

Aside from the obvious problems with this fanciful depiction of the work done by a modern state, there is nothing in *Gijima* which suggests a clear understanding of what it would mean for the state to hold itself to account. In the context of debates on state capture and developing modes of accountability discussed elsewhere in this collection, what the state is, and whether it can claim rights against itself, emerges as an increasingly important concern.

VI CAN THE STATE CLAIM RIGHTS AGAINST ITSELF?

A natural starting point in answering this question is s 8(4) of the Constitution. It provides that juristic persons are entitled to the rights in the Bill of Rights 'to the extent required by the nature of the rights and the nature of that juristic person'. The scope of this qualifier has not yet received attention from the Court. In fact, s 8(4) has largely been ignored by South African courts. Nor does the Constitution itself provide much further guidance. Unlike in the case of determining who is bound by the Bill of Rights, there is no helpful coda – played in the former instance by s 8(3) – which explains how the provision should be applied.

What is notable is the slight difference in wording between s 8(2) and s 8(4). Where the former states that juristic persons are bound by the Bill of Rights to the extent required 'by the nature of the right and the nature of the duty imposed by the right', the latter provides that juristic persons are entitled to the rights in the Bill of Rights to the extent required 'by the nature of the rights and the nature of that juristic person'. The difference is that, in the case of s 8(2), emphasis is put on the *duty* imposed by the right, while in the case of s 8(4), emphasis is put on the *nature* of the juristic person.

This may suggest a general reluctance to extend the application of the Bill of Rights beyond the relationship between 'qualifying' juristic persons – those who exhibit certain (at present unclear) features – and those persons covered by ss 8(1) and 8(2) of the Constitution. But the shift away from the vertical view of rights discussed in the section above remains: anyone can now be both the holder of rights, and the bearer of corresponding duties, if the reasons are good. As the Court puts it in *Association of Mineworkers and Construction Union*, the Constitution 'casts up no impenetrable wall between the public and the private'.[61] Our legal order rebuffs a doctrinal approach to the application of the Bill of Rights.

[61] *Association of Mineworkers and Construction Union v Chamber of Mines of South Africa* 2017 (3) SA 242 (CC), 2017 (6) BCLR 700 (CC)('*AMCU*') at para 68.

Assuming – correctly, I believe – that organs of state are juristic persons, what, then, is the 'nature' of the state for the purposes of s 8(4)? Specifically, what is the nature of the state at the point it seeks to rely on a right against itself? The Constitution's definition of organ of state is helpful in this regard. It defines an organ of state as either, 'any department of state or administration in the national, provincial or local sphere of government', or any 'functionary or institution… exercising a power or performing a function in terms of the Constitution or a provincial constitution or exercising a public power or performing a public function in terms of any legislation'.[62]

The Constitution therefore defines the state *either* by its institutional position *or* by its function. This raises the intriguing proposition that an organ of state in the first sense may perform acts that are not public in nature.[63] If this is the case, then why should an organ of state not invoke the right to just administrative action in a costume different to that it wore in making the original decision it now seeks to review? In language more faithful to s 8, why should the nature of an organ of state not be different at the point it makes a decision and at the point it reviews it? This is even more credible in the case of an outwardly private party who previously exercised a public power, and now seeks to review its own decision in a private capacity.

The point is that when determining the 'nature' of an organ of state for the purposes of s 8(4), the emphasis should be on the *function* of the decision, rather than the functionary itself. This suggests we may also need to move our understanding of the state away from a collection of definable institutions and entities. This important work of 'reimagining' our accepted depiction of the state deserves book length study beyond the ambit of this short diagnostic note. I would like to end, however, with a suggestion of one direction in which this work may go. In my view, rather than seeing the state as an homogeneous whole – a definable thing – s 8(4) challenges us to approach it as an assortment of *processes*. This would imply that the state is the instantiation of a variety of different social practices. As Nicos Poulantzas explains, the manifestations of the state are the *effect* of various social productions and contestations, rather than things in themselves.[64]

Gaston Bachelard provides a helpful metaphor for this reading. He explains that 'the idea of the state' is analogous to the pre-scientific idea of fire: flames appear to be an object or a thing – they have 'palpable confirmations' – giving rise to substantialist ideas of fire as some essential quality.[65] In reality, however, fire is no more than the outcome of physical processes. An account of fire must therefore be in terms that invoke these processes rather than the effects that follow.

Similarly, the state is not an entity in itself, but instead an assortment of varying processes that bring about decisions and visible applications. Determining whether or not an organ of state should be entitled to rely on a right should consequently focus on the underlying processes that manifest themselves in the organ seeking to rely on the substantive entitlements of the 'right'. This analysis can have fluctuating outcomes – it is a sociological and factual determination rather than a strict rule. Understood in this way, it is perfectly coherent for the

[62] Constitution s 239.

[63] *Cape Metropolitan Council v Metro Inspection Services (Western Cape) CC* [2001] ZASCA 56, 2001 (3) SA 1013 (SCA); *AMCU* (note 61 above) at para 69.

[64] N Poulantzas *State, Power, Socialism* (2000).

[65] G Bachelard *The Poetics of Space* (2014).

state-as-process to rely on rights against the state-as-process: this interaction does no more than form part of the set of mechanisms by which the state proceeds.

Such an interpretation is in contrast to the *Gijima* Court's view of the state as *itself* the source of social harms, and therefore the target of the historical changes in the character of administrative law aimed at preventing the abuse of state power.[66] The 'flames and heat' of the Apartheid regime's performance of administration results in the court misconstruing the 'wood' of a dominant (and nefarious) ideological process for the 'trees' of the state. Instead of seeing administrative justice as a mechanism to prevent the abuse of public power, the court sees it as a tool to prevent the abuse of private citizens by the state.

This leaves the Court's argument that it is 'inconsonant that the State can be both the beneficiary of the rights and the bearer of the corresponding obligation that is intended to give effect to the rights.'[67] Again, the problem only arises if the state is construed as a monolithic entity. As soon as SITA's decision to review its own decision, and the making of the decision itself, are seen as two separate processes, the difficulty falls away. While the decision-maker may be both the bearer of the right and of its corresponding duty, the processes that lead up to each decision are distinct. SITA as bearer-of-rights is not a mimetic representation of SITA as bearer-of duties.

This is not to say that organs of state should always be entitled to rely on rights. Instead, the limitation of the ambit of the application of rights to state entities should be a dependent fundamentally on the nature of the process (together with the nature of the right), rather than merely on the basis of the state being the state. Judgments like *Gijima* emerge from a dogmatic application of the reasoned law illustrated by *Blue Moonlight*. Who should be held to account, and by whom, is a processive inquiry. As the facts of cases like *Kirland*, *Tasima* and *Aurecon* show, the state is made up of competing interests, often inhabiting the same institutional position at different times. The emphasis should always be on how best to uphold the substantive obligations that rights protect. Taking this approach allows rights to function as normative guidelines, and liberates state entities from the strictures of too vertical a vision of law and society.

[66] *Gijima* (note 1 above) at para 26.

[67] Ibid.